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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

Dr. TENKASI M. VISWANATHAN --- PETITIONER

VS.

THE FAYETTEVILLE STATE UNIVERSITY

BOARD OF TRUSTEES et al. --- RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Chadbourn NC 28431
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QUESTIONS PRESENTED

1. What constitutes a contract, when an old candidate applies for a new faculty appointment under explicit orders from a supervisory Board and the terms of the review for the new appointment are set out to be those for reappointment as set forth in the published university regulations? Does not the published handbook of regulations provide a species of contract?

LIST OF PARTIES

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

T.M. VISWANATHAN, Plaintiff-Appellant;

THE FAYETTEVILLE STATE UNIVERSITY BOARD OF TRUSTEES, THE CHANCELLOR OF FAYETTEVILLE STATE UNIVERSITY, DR. LLOYD V. HACKLEY in his official and individual capacity, and Dr. JON YOUNG in his official and individual capacity, Defendants-Appellees.

This petition is not being submitted by or on behalf of any corporation, and there is no parent or subsidiary company to be listed by the petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The **Opinion** of the United States Court of Appeals for the Fourth Circuit appears in Appendix A at page A-1 to the petition and is unpublished. The opinion was entered on September, 19, 1997. The **Order** of the United States Court of Appeals for the Fourth Circuit denying Petition for Rehearing was entered on November 4, 1997. The order appears in Appendix C at page A-41.

The Order of the United States District Court for the Eastern District of North Carolina granting Summary Judgment in favor of the Defendants was entered on April 28, 1997. The Order appears in Appendix B at pages A-5. **JUDGMENT** in the case was entered on April 29, 1997 in

favor of the Defendants by the United States District Court for the Eastern District of North Carolina (Appendix B at p. A-3.).

The first administrative decision of the University of North Carolina Board (UNC Board hereinafter) of Governors was entered on September 16, 1991. This decision authorized Petitioner to reapply to Fayetteville State University (FSU) for a new appointment under the terms of the university regulations for reappointment. Appendix B at A-17, A-19.

The Order on Petition for Judicial Review was entered by the Superior Court of New Hanover County, State of North Carolina on February 24, 1993. The Order reversed the second administrative decision of the UNC Board of Governors denying Petitioner's contractual right to review by the Hearing and Reconsideration Committee of FSU of the second non-reappointment decision of FSU. Appendix B at p. A-28. The second UNC Board decision, reversed by the New Hanover County Superior Court appears in Appendix B, at p. A-24, A-25. The final decision of the FSU Board of Trustees was entered on October 14, 1993 and appears in Appendix B at

p. A-32. The final administrative decision of the UNC Board was adopted on September 9, 1994. Appendix B at A-34.

JURISDICTION

The date on which the United States Court of Appeals decided the case was September 19, 1997. The unpublished decision simply affirmed the decision of the District Court. The District Court held that in the absence of a new contract, only an old contract that had expired in 1990 determined the rights of the parties. The District Court held that as a result of the old contract, "time began to run on 8 February, 1990, when plaintiff first received notice that he would not be reappointed." Appendix B at page A-14. The District Court totally ignored the fact that there **was a new application** for a **new appointment** that was triggered by the September 16, 1991 decision of the UNC Board of Governors and that the standard of review would be as set forth in the FSU tenure regulations for reappointment of faculty. The District Court appears to have held the promise contained in the September 16, 1991 Order of the UNC Board as illusory.

A timely petition for rehearing was denied by the United States Court of Appeals on November 4, 1997.

Petitioner invokes the jurisdiction of the Supreme Court of the United States under 28 U.S.C., Section 1254(1).

Petitioner is an alien and stated five claims alleging breach of contract and violation of civil rights guaranteed by 42 U.S.C., Sections 1981 and 1983. All claims were based on contractual rights.

The jurisdiction of the Supreme Court of the United States to review the **Orders** in question by writ of certiorari is conferred by Rule 10.1(b, c) of the Rules of the Supreme Court. This case poses the question as to what constitutes a contract, when an administrative decision contains a promise and a consideration and the terms of that promise and consideration are set forth in the official university publication on faculty appointments.

Claims under 42 U.S.C., Section 1981 must arise from contractual underpinnings. An alien's claim based on breach of contract is a federal question. In the instant case, Rule 10(b) of

the Rules of the Supreme Court applies, because two state courts of last resort have decided this important federal question in a way that conflicts with the decision of the United States Court of Appeals for the Fourth Circuit. In Small v. Springs Indus., 292 S.C. 481, 357 S.E.2d 452 (1987), the South Carolina Supreme Court reached a different conclusion from that of the Fourth Circuit Court of Appeals. The Supreme Court of Michigan similarly reached a different conclusion from that of the Fourth Circuit Court of Appeals in Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 619, 292 N.W. 2d 880, 895 (1980).

Jurisdiction of the Supreme Court of the United States to review this case also arises under Rule 10(c) of the Rules of the Supreme Court, since it does not appear that this Court has considered civil rights questions that are based not on explicit contract, but on published regulations of a public institutions of education and the promise and consideration like the one contained in the September 16, 1991 UNC decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petition involves the provision of Equal Rights under the Law that are conferred by 42 U.S.C., Section 1981 and Application of that provision under 42 U.S.C., Section 1983. It also involves breach of contract claim under the original jurisdiction of the District Court; Petitioner is an alien. Additionally the case involves the university regulations published under the caption: "Tenure Policies and Regulations of Fayetteville State University", prescribing standards of review for new appointment as well as reappointment to the faculty of FSU; the regulations from the Code of the University of North Carolina; and North Carolina Judicial Review Statutes. Appendices D, E, and G.

STATEMENT OF THE CASE

Petitioner Viswanathan was Plaintiff-Appellant before the United States Court of Appeals for the Fourth Circuit. Fayetteville State University is one of the constituent institutions of the University of North Carolina. Persons applying for a faculty position at FSU do not need the permission of any organization to submit an application.

However the standard of review for new applicants is carried out under the standard of (new) appointments. The standard of review for reappointment to the faculty is totally different from that of the review for (new) appointments. Any appointment to a specific rank that goes under the designation of "Assistant Professor", "Associate Professor", or "Professor" are termed tenure-track appointments according to the regulations of FSU. Appendix D at A-45, A-46.

On September 28, 1991, Petitioner Viswanathan applied to a faculty position of "Associate Professor" in the Department of Mathematics and Computer Science. District Court's Order at A-7. At that time Viswanathan was not a faculty member at FSU. Under such circumstances, his application would normally be reviewed under the standard for new appointees. FSU held that position and several orders had to be entered to change the course of the review. District Court's Order at A-7, first paragraph, and the Order on Petition for Judicial Review at A-29 (last paragraph), finding that the review in 1992 was based on unlawful procedure.

When Viswanathan applied for a position of "Associate Professor" at FSU on September 28, 1991, there was an order or a decision from the UNC Board of Governors that had been entered on September 16, 1991. Appendix B at A-23, A-24. The order of the UNC Board contained a promise and consideration, when it stated that, should Viswanathan apply for a new position at FSU, his credentials should be reviewed under the standard of appointment for reappointment to faculty ranks. The UNC Board's decision stated as follows:

> "[T]he Committee recommends that . . . Professor Viswanathan be given an opportunity to request reappointment as an Associate Professor. This request, if made, should follow the procedures prescribed by FSU Tenure Regulations and should be initiated at the department level." Appendix B at A-24.

Viswanathan was presented with an opportunity to influence a favorable decision during the second review. There is a world of difference between a review for a new appointment and a review for reappointment. All reviews, whether they are for new appointment or for reappointment pass through the administrative channels for review that are prescribed in the regulations. Section 3.C(1), Appendix D at A-

49, A-50. The review is initiated at the department level, and passes through the Dean, the Provost/Vice Chancellor for Academic Affairs, and the Chancellor. The prescribed channels for review are stated in Section 3.C(1) at A-49, A-50. A recommendation may be favorable recommending appointment or reappointment, or it may be unfavorable, recommending non-appointment or non-reappointment. Appointments, and Reappointments.

In the case of a new appointment, the Chancellor makes the final decision. His decision is not reviewable. The Chancellor can make a favorable appointment, even if a reviewing administrative officer below the Chancellor had made an unfavorable recommendation. In the case of a new appointment, the Chancellor holds and wields the power of final decision, and that decision is not reviewable. Only a decision for non-reappointment or non-promotion is reviewable. Appendix D, Section 3.C.(1) at A-50, second paragraph, and Section 3.C.(2) at A-51. Also the Code of the UNC Board, Appendix E, Section 604 A at A-69.

In the case of a reappointment, the FSU Tenure Regulations present a totally different picture. If one of the Officers below the Chancellor, that is if the Department Chairman, Dean, or the Provost/Vice Chancellor for Academic Affairs makes an unfavorable recommendation for reappointment, then that recommendation becomes a decision, and the decision is final unless it is contested. Appendix D, Section 3.C(2) at A-51. The grounds for contestation are limited to those stated to be impermissible in Section 5.A of the FSU Tenure Policies. Appendix D, Section 5.A at A-53, A-54. Also the Code of the UNC Board, Section 604 B at A-71.. In such a case, when an unfavorable decision recommending non-reappointment has already been made by an officer of lower rank than the rank of the Chancellor, the Chancellor does not make any decision favorable or unfavorable. The unfavorable decision is only communicated to him for his knowledge. Appendix D, Section 3.C(2) at A-52. (The channels prescribed for review are stated above, see Appendix D, Section 3.C(1). The finality is reached through a process of

contestation and review of the appeal proceedings. Finality is reached, if the unfavorable decision is not contested; if the decision is contested as being based on impermissible grounds explicited in Section 5.A of the FSU Tenure Policies, then finality is suspended, and finality is reached only upon completion of prescribed proceedings enunciated in Section 5.A. Appendix D, Section 3.C(2) at A-51. Finality is rendered by the FSU Board of Trustees. See Appendix D, Section 3.C(1) at A-50 last few lines (The Chancellor has finality of decision only for favorable recommendations.) Also last few lines of Section 3.C(2) at A-52. (The Chancellor only receives information that an unfavorable recommendation has been made, when an Officer of lower rank has made an unfavorable recommendation.)

Of course, if all the reviewing officers below the rank of the Chancellor, that is if the Department Chairman, the Dean, and the Provost/Vice Chancellor --- all of then have made a favorable recommendation for reappointment, then the Chancellor has a significant role to play in the reappointment

process. The final decision rests in this case with the Chancellor, provided his decision is not contested. Section 3.C(1), second paragraph at A-50. If the Chancellor's decision is contested as being based on impermissible grounds, then finality is suspended and finality is reached through yet another process of appeal proceedings. See Section 5.B, footnote 6 at A-54, and the Code, Section 501(C) at A-62 (Appeal to the UNC Board through the President of UNC). Please also see N.C. Administrative Procedure Act, G.S., Section 150B-1 (The same person shall not make both a decision and adjudication).

This significant difference between a new appointment and a reappointment in reaching finality of a decision is made available by the FSU Tenure Policies in order to protect Academic Freedom. The phrase "academic tenure" is used in a very broad sense. Appendix D at A-45, second paragraph. It "is intended to secure" for faculty members "their academic freedom" and "help the institution attract and retain faculty members of high quality.. Appendix D at A-44 (last few lines), and A-45 (first line). Academic tenure "refers to the

protection of a faculty member against involuntary suspension or discharge from employment" except upon specified grounds. Appendix D at A-45, first paragraph. "Academic tenure . . . pertains exclusively to the employment of faculty members by appointment to specific faculty ranks." Appendix at A-45, second paragraph. The rank of Associate Professor is one such specific faculty rank (at A-46) and academic tenure of an Associate Professor may not be withheld on grounds that are specifically stated to be impermissible in Section 5.A. of the FSU Tenure Policies. Appendix at A-46 and Section 5.A at A-55, opening lines on nonreappointment of persons on probationary terms).

As stated at the beginning of this "Statement of the Case", Petitioner Viswanathan did not need the authorization of the UNC Board to apply for a faculty position at FSU. He would however, need a special order, if the standard of review of his credentials for the appointment, he was seeking, be different from the standard of review for new appointments. As

stated in the foregoing, such an order was entered on September 16, 1991 by the UNC Board.

The UNC Board had entered its September 16, 1991 order pursuant to its findings that are stated in the order at Appendix B at A-21 -A-23. Petitioner Viswanathan had been employed during the academic year 1989-90 as Associate Professor in the Department of Mathematics and Computer Science at FSU. As an Associate Professor, he was on tenure track and enjoyed the incidents of tenure. Academic tenure, that is reappointment was withheld at the end of his initial one-year contract. Academic tenure could be withheld on any grounds except on the grounds stated to be impermissible in Section 5.A. of the FSU Tenure Policies. Appendix D at A-53, A-54 and the Code at A- 69. The recommendation not to reappoint Viswanathan was made by Dr. Joseph Monroe, the Vice Chancellor for Academic Affairs. As a recommendation denying reappointment, the recommendation of Dr. Monroe became a decision. Petitioner contested the decision of Dr. Monroe as one being based on impermissible grounds. Under

Section 5.A. of the FSU Tenure Policies, a nonreappointment decision of an associate professor is based on impermissible grounds, if it is established that the decision was based on the faculty member's exercise of rights guaranteed by the First Amendment to the United States Constitution, or based on considerations of the faculty member's race, sex, religion, or national origin, religion, or based on personal malice.

Viswanathan contested the non-reappointment decision of Dr. Monroe alleging that the negative decision was an act of retaliation for the remarks he had made criticizing the academic policies of the Vice Chancellor in a public meeting before the Chancellor on or about December 4, 1989. See Appendix D at A-21, A-22. He then activated the process of contested proceedings set forth in Section 5.A. by appealing the matter to the FSU Hearing and Reconsideration Committee. After its proceedings, the Committee held that Petitioner had satisfactorily established his contention and recommended reinstatement. At A-18, second paragraph. The findings and the recommendation of the Hearing Committee

were then transmitted to the FSU Board of Trustees through the official medium of the Chancellor. Appendix at A-63, A-64. The FSU Board did not accept the recommendation of the Hearing Committee. Then the matter was appealed to the UNC Board of Governors. The UNC Board found that the decision was tainted by a violation to the First Amendment. At A- 27. The UNC Board then held that while a new review free from the prior taint was in order, the university should also have a renewed opportunity to consider the "current credentials" of the Petitioner. At A-23, A-24. The UNC Board asked that Viswanathan reapply to FSU to the rank of Associate Professor as a new candidate, but that the standard of review be that of a review for reappointment as set out in the FSU Tenure Policies.

As stated in the foregoing, Petitioner Viswanathan then did submit an application for employment. At A-27 and A-37, top line. After much delay and another appeal, the review that was ordered by the UNC Board was finally undertaken in March. 1992. District Court's Order at A-7. At the expiration

of the deadline set out by the UNC Board, the Chancellor notified Dr. Viswanathan that a position would not be offered to him." The decision was then upheld by the UNC Board through its order of June 12, 1992. Appendix at A-37.

Through its order of September 16, 1991 the UNC Board had ordered that the standard of review of Petitioner's credentials be the standard of review for reappointment. That standard confers the right to contest a negative decision under the limited grounds stated to be impermissible in Section 5.A. of the FSU Tenure Policies. Thus, when Petitioner was not reappointed after the second review in 1992, Petitioner "sought to appeal the decision not to offer him an appointment through the campus procedures for non-reappointment cases". FSU held that since Viswanathan was not employed at FSU during the year 1991-92, when the second review took place, he could not invoke the standard of review for reappointment. As a result, "these avenues [of contested proceedings enunciated in Section 5.A. of the FSU Tenure Policies] were not made available to him". Appendix at A-37 and A-38.

Thereupon, Petitioner "filed suit [judicial review of the June 12, 1992 administrative decision under N.C.G.S., Section 150B-43 at A-75] in New Hanover County Superior Court, contending that he had a right to the campus appeal proceedings". Appendix at A-38. "The [New Hanover County Superior] court agreed that he [Petitioner] had a right to such appeal proceedings in accordance with the FSU procedures and ordered that this process should begin. Appendix at A-38.

Petitioner's **Complaint** in the District Court for the Eastern District of North Carolina begins with this Order on Petition for Judicial Review entered by the New Hanover County Superior Court entered on February 24, 1993. Appendix at A-28. In the 1992 review that was undertaken upon order of the UNC Board, the first recommendation for non-reappointment had been made by Dr. Jon Young, then Acting Dean of the College of Arts and Sciences. See District Court's Order at A-7. Under the standard of reviews for reappointment of associate professors, Dr. Young's recommendation became a decision. Petitioner Viswanathan

contested that decision contending that the decision was based on all three of the impermissible grounds prohibited by the FSU Tenure Policies. In his recommendation document, Dr. Young stated that he revisited the original grounds upon which Dr. Monroe had based his 1990 decision of non-reappointment, and that he, Dr. Young, agreed with Dr. Monroe's decision. Petitioner then asserted that the new review done by Dr. Young was not free from the original taint caused by the violation to the First Amendment.

Petitioner also contended that there were both personal malice and First Amendment violation, based on the following circumstances. During the academic year 1990-91, Dr. Young was Chairman of the Department of Humanities and as Chairman, had tried hard to build a file against a tenured faculty member of the Department of Humanities, by name Dr. Kobina Oguah. Dr. Young had recommended that the appointment of Dr. Oguah be terminated, even though Dr. Oguah was tenured. Dr. Oguah was then placed under suspension by Chancellor Hackley. Dr. Oguah had contested

the decision, and since, Dr. Oguah was a tenured faculty member, FSU had the burden of proof in showing that Dr. Oguah had been negligent in his duties. The proceedings took place in December, 1991, when the second review of Dr. Viswanathan's credentials was pending at FSU. In such proceedings, Dr. Oguah would be allowed a faculty member to represent him. FSU was represented by the N.C. Attorney General Office. The proceedings were not going favorably for Dr. Oguah. Thereupon, during a short recess, Dr. Oguah called upon Petitioner Viswanathan to represent him. Petitioner was singularly responsible for the turning of the tide in favor of Dr. Oguah. Petitioner raised questions of academic merit and showed that Dr. Oguah was both a successful teacher and a researcher. The Hearing and Reconsideration Committee seized the occasion showing that while Dr. Oguah had not been spectacular in following administrative orders, his omissions did not rise to the level of negligence. His academic performance outweighed any short comings that might have arisen as a result of his failure to follow administrative orders

of no consequence. The Hearing Committee then concluded that the FSU Administration had not carried its burden of proof and recommended reinstatement of Dr. Oguah. Soon after, Dr. Oguah was reinstated.

Petitioner Viswanathan contended that in representing Dr. Oguah before the Hearing Committee against the decision of Dr. Jon Young, he had exercised his rights under the First Amendment by seeking redress of Dr. Oguah's grievances by petitioning the proper governmental authorities and in doing so, he had defeated Dr. Jon Young, who had spent a year building the file against Dr. Oguah. The 1992 unfavorable decision of Dr. Young coming soon after Dr. Oguah's hearing was an act of retaliation for Petitioner's exercise of his First Amendment rights in seeking redress of grievances. In as much as Dr. Young was defeated in his purpose of terminating the tenured appointment of Dr. Oguah, the non-reappointment decision of Dr. Young as Acting Dean was based on personal malice.

Petitioner also contended that the non-reappointment decision of Dr. Young was also based on consideration of the alien status of the Petitioner, since Dr. Young considerably delayed the reviewing process by asking for visa documents and employment eligibility documents authorizing employment emitted by the Immigration and Naturalization Service (INS). This was like putting the cart before the horse, as it is the university that has to sponsor such authorization. Petitioner needed such authorization by the INS. Moreover, it was not for Dr. Young, as Dean of the College of Arts to ask for such documents. Such verification belongs to the domain of the Director of Personnel. Indeed, by delaying the offer of appointment, one could effectively preempt employment by making the offer at the last minute and then pleading that the candidate could not produce the required authorization in a timely manner. As one subject to the jurisdiction of the United States, Petitioner had equal rights to contract under the purview of 42 U.S.C., Section 1981.

Petitioner pleaded before the New Hanover County Superior Court that he had a right to the contested proceedings based on the foregoing allegations. The Superior Court agreed In its finding of facts, the Order on Petition for Judicial Review (Appendix at A-29, A-30) stated that the June1992 decision of the UNC Board was based on unlawful procedure, in as much as Petitioner was not given an opportunity to show if the decision of Jon Young was based on impermissible grounds. At A- 29, A-30. The Superior Court thereupon reversed the June 16, 1992 decision of the UNC Board and ordered that the contested proceedings should begin and follow the FSU Tenure Policies.

The Hearing before the Hearing Committee was held in June, 1993. The Hearing Committee sustained Petitioner's contentions on all three impermissible considerations by Dr. Young. Appendix at A-38.

After the recommendation of the FSU Hearing and Reconsideration Committee, the mandatory provision in

Section 5. G at A-61 was not complied with. Appendix at A-61. The regulation states:

> Within five days after receiving such a recommendation [from the Hearing and Reconsideration Committee], the department chairman [the Dean] shall notify the faculty member, his own immediate supervisor, and the chairman of the Hearing and Reconsideration Committee what modifications, if any, he will make with respect to his original decision not to reappoint.

Petitioner showed by affidavit in the District Court that such a communication was never received by the Petitioner and that the Official Record did not show any such communication from Dr. Young. Instead, Respondent Dr. Hackley made a de novo decision through a letter dated August 2, 1993 in which he stated that Petitioner "will not be reappointed to the faculty of Fayetteville State University." At A-38.

Petitioner contested the decision of Dr. Young and it was the non-reappointment decision of Dr. Young that was under appellate scrutiny. The FSU Chancellor as executive head of the university, has no appellate jurisdiction in a

contested proceeding. On October 5, 1993, the FSU Board of Trustees converted the decision of Dr. Young into a decision of Dr. Hackley and stated as follows (Appendix at A-33):

> The Board concluded to accept the Chancellor's decision and confirmed the chancellor's authority to not reappoint you to a faculty position."

Thus the FSU Board again converted the review to one of a new appointment, abandoning the review for reappointment.

The Complaint stated that this conversion of Dr. Young's decision to one of Dr. Hackley's decision was a breach of contract, and asserted five claims arising as a breach of the contract. Except for two claims, all were asserted under 42 U.S.C., Section 1983, as arising from deprivation under color of state law of rights guaranteed under 42 U.S.C., Section 1981. One of the claims was based on breach of contract and another based on deprivation of rights and damages arising from personal malice.

The District Court, never considered, the new application for appointment that had been submitted in

September, 1991. The District Court based its decision on the original contract that Petitioner held during the academic year 1989-90. That contract was an initial tenure-track appointment for one year and expired in May, 1990. It did not consider the September 16, 1991 decision of the UNC Board and the Order on Petition for Judicial Review as conferring contractual rights.

REASONS FOR GRANTING THE PETITION

The decision of the District Court and that of the Fourth Circuit Court of Appeals are in conflict with rulings of two state courts of last resort. The question before the Court is: "What constitutes a contract under the circumstances obtained in this case?" The District Court appears to have considered the promise contained in the September, 1991 decision of the UNC Board of Governors as illusory.

An employer's handbook of regulations furnishes a species of contract. In Small v. Springs Indus., 292 S.C. 481, 486, 357, S.E.2d 452, 455 (1987), the Supreme Court of South Carolina stated as follows:

> We hold that a jury can consider an employee handbook along with other evidence, in deciding whether the employer and employee had a limiting agreement on the employer's at-will employment status."

The alleged employment contract is based on agreement which requires mutual assent and consideration. See 1, Corbin on Contracts, Vol 21 at 54 (1963). "An employment contract requires an exchange of valuable consideration, which may consist of either a benefit accruing to a party or a detriment suffered by another party. Refraining from doing something that one has a legal right to do constitutes good consideration, regardless of the value of that right to the other party." 27 Amer. Jur. Prudence, 2d. Section 1, p.552 (1996).

In Toth v. Square D. Co., 712 F.Supp., 1231, 1234, 1236 (D.C.S.C. 1989), the District Court of South Carolina cited the Small Court and based its decision on principles of equity and fairness. The employer had to be in compliance with the provisions of the handbook.

Under the provisions of the FSU Tenure Policies, Dr. Young had to notify The Petitioner whether he would make

modifications to his original decision not to reappoint. Section 5.G at Appendix A-61. The FSU Board of Trustees could not by any means convert the decision of Dr. Young to one of Dr. Hackley. Petitioner had an opportunity to contend only the decision of Dr. Young. Under the altered circumstances where the original decision of Dr. Young was abandoned and converted to one of Dr. Hackley, had there been at least a semblance of a hearing, giving the Petitioner an opportunity to contest the decision of Dr. Hackley, it could be said that the review process was fair and consistent with the regulations. Such a hearing of Dr. Hackley never took place. The regulations provide for a contested hearing of Dr. Hackley's decision, only when the first non-reappointment decision is made by the Chancellor and all officers below him have made favorable recommendations. Appendix at A-54, footnote 6. In the instant case, the first unfavorable decision was made by Dr. Young as Acting Dean.

In Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 619, 292 N.W. 2d 880, 895, the Michigan

Supreme Court held that once a policy is announced with a certain view, for example to obtaining a review free from taint, the employer may not treat its promise as illusory. The District Court however, does not appear to have paid any attention to the illusory nature of the promise contained in the September 16, 1991 decision of the UNC Board of Governors.

In Walker v. Westinghouse Electric Corporation, 77 N.C. App. 253, 259, 335 S.E. 2d 79, 83 (1985), the North Carolina Court of Appeals made even a stronger holding.

> "Once [the defendant employer] voluntarily chose to publish the handbook and bulletin and orally assure the employee that the provisions of those publications would be followed, there were 'strong equitable and social policy reasons militating against allowing the employers to promulgate for their employees potentially misleading personnel manuals while reserving the right to deviate from them at their own caprice."

Section 5.G of the FSU Tenure Policies is couched in mandatory terms. The Toth Court, 712 F.Supp. at 1235 expressed itself strongly, when an employer ignores mandatory provisions of a handbook The Toth Court continued:

> The essential elements of any contract are mutual assent to be bound, usually demonstrated by offer and acceptance and exchange of valuable consideration.

Citing Baylon v. Bath, 189 S.C. 269, 270, 1 S.E.2d 139, 140 (1939); Mcpeters v. Yeargin Const. Co., 290 S.C. 327, 331, 350, S.E.2d 208, 210-211 (Ct. Of App. 1986).

Petitioner performed the conditions contained in the employer's promise. The breach of contract occurred on October 5, 1993, when the promise was broken.

CONCLUSION

Based on the foregoing considerations, the Petition for a writ of certiorari should be granted.

Respectfully submitted this the 2nd day of February, 1998.

Tenkasi M. Viswanathan, Pro-se
65 Magnolia Lane
Chadbourn, NC 28431
Tel: 910-654-3093

Supreme Court, U.S.
FILED

97 1271 FEB 2 1998

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

Dr. TENKASI M. VISWANATHAN --- PETITIONER

VS.

THE FAYETTEVILLE STATE UNIVERSITY

BOARD OF TRUSTEES et al. --- RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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84 pp

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APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-1735

Dr. Tenkasi M. VISWANATHAN,

Plaintiff-Appellant,

versus

FAYETTEVILLE STATE UNIVERSITY BOARD OF TRUSTEES, DR. LLOYD V. HACKLEY, Chancellor of Fayetteville State University, in his official and individual capacity; Dr. JON YOUNG in his official and individual capacity,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina at Wilmington. W. Earl Britt, District Judge. (CA-96-160-7-BR)

Submitted: September, 11197 Decided: September 19, 1997

Before RUSSELL, MURNAGHAN, and HAMILTON, Circuit Judges.

Affirmed by unpublished per curiam opinion

T.M. Viswanathan, Appellant Pro Se. Celia Grasty Jones, OFFICE OF THE ATTORNEY GENERAL OF NORTH CAROLINA, Raleigh, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Appellant appeals the district court's orders dismissing his civil complaint. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. Viswanathan v. Fayetteville State University Bd. Of Trustees, No. CA-96-160-7-BR (E.D.N.C. Apr. 29, 1997.) We dispense with oral argument because the facts and legal contentions are

adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
ESTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

No. 7:96-CV-160-BR(3)

FILED APRIL 29, 1997
DAVID W. DANIEL, CLERK
U.S. DISTRICT COURT
E.DIST NO. CAR.

Dr. TENKASI M. VISWANATHAN)
Plaintiff,)
)
v.)
)
THE FAYETTEVILLE STATE)
UNIVERSITY BOARD OF TRUSTEES,)
the Chancellor of Fayetteville State)
University, DR. LLOYD V. HACKLEY)
in his official and individual capacity,)
and Dr. JON YOUNG in his official and)
individual capacity)
Defendants)

JUDGMENT

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED AND DECREED that defendants' motion for summary judgment is **GRANTED** and this matter is DISMISSED as to all defendants. (BRITT, J.)

THIS JUDGMENT FILED AND ENTERED ON APRIL 29, 1997 & COPIES TO:

Tenkasi M. Viswanathan
7405 Alcoa Way
Wilmington, NC 28405

Celia Grasty Jones
Asst. Attorney General
P.O. Box 629
Raleigh, NC 27602-0629

April 29, 1997

DAVID W. DANIEL, CLERK
(Sd.) _____
(By) Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
ESTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

No. 7:96-CV-160-BR(3)
FILED APRIL 28, 1997
DAVID W. DANIEL, CLERK
U.S. DISTRICT COURT
E.DIST NO. CAR.

Dr. TENKASI M. VISWANATHAN Plaintiff,	)
v.	)
THE FAYETTEVILLE STATE UNIVERSITY BOARD OF TRUSTEES, the Chancellor of Fayetteville State University, DR. LLOYD V. HACKLEY in his official and individual capacity, and Dr. JON YOUNG in his official and individual capacity Defendants	)

ORDER

This matter is before the Court on defendants' Motion to dismiss pursuant to Rule 12(b)6 of the Federal Rules of Civil Procedure. Plaintiff, proceeding pro se, filed a response. Defendants did not file a reply, and the time in which to do so has passed. This matter is now ripe for decision.

I. BACKGROUND

Plaintiff, Dr. Tenkasi M. Viswanathan, was employed by Fayetteville State University ("FSU") as an Associate Professor in the Department of Mathematics and Computer Science pursuant to an initial one-year contract for the 1989-1990 academic year. By letter dated 8 February 1990

defendant Lloyd V. Hackley ("Hackley") then Chancellor of FSU, officially notified plaintiff that he would not be reappointed for the 1990-91 academic year. Plaintiff pursued FSU's internal procedures for the review of non-reappointment decisions, and appealed the non-reappointment to the FSU Hearing and Reconsideration Committee. The Hearing and Reconsideration Committee recommended that plaintiff be reappointed for a second one-year term. Defendant Hackley declined to accept this recommendation, and plaintiff was not reappointed[1].

Plaintiff appealed his non-reappointment to the FSU Board of Trustees ("the Board") which upheld Hackley's decision. Plaintiff next appealed the Board's affirmance of his non-reappointment to the Board of Governors of the University of North Carolina. They held a hearing, made factual findings, and concluded that plaintiff be allowed to submit an application to FSU for reappointment.

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[1] Pursuant to Tenure Policies and Regulations of FSU, the Chancellor has final authority with respect to decisions regarding reappointment, and non-reappointment of contract faculty. Tenure Policies and Regulations – Fayetteville State University, Section 3(C)(1).

On September 28, 1991, plaintiff requested reappointment. By 15 February 1992, plaintiff had not herd from FSU regarding this request, so he again appealed to the Board of Governors of the University of North Carolina. In response, they set a date of 8 May 1992 by which time FSU had to act upon plaintiff's request for reappointment.

In early March 1992, members of FSU's Department of Mathematics and Computer Science recommended plaintiff be reappointed; however, defendant Jon Young ("Young"), Dean of FSU's College of Arts and Sciences, disagreed with the departmental recommendation. On 6 May 1992, Hackley decided not to reappoint plaintiff. Plaintiff again appealed this decision to the Hearing and Reconsideration Committee and was again recommended for reappointment. Hackley again declined to accept the recommendation, and plaintiff was not reappointed. Plaintiff again appealed to the Board of Governors of the University of North Carolina, which upheld Hackley's decision.

Plaintiff filed a lawsuit in the Middle District of North Carolina alleging that FSU's refusal to reappoint him violated his constitutional rights under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C., Sections 1981 and 1983. The Honorable Hiram Ward dismissed these claims pursuant to Rule 12(b)(6)[2]. Plaintiff then filed post-judgment motions pursuant to Rules 52(b) and 59(e) which were denied. Plaintiff next appealed Judge Ward's decision to the United States Court of Appeals for the Fourth Circuit which denied plaintiff's Rule 60(b) motion and affirmed Judge Ward's decision. Plaintiff has filed a petition for writ of certiorari in the United States Supreme Court which is currently pending.

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[2] The court notes that plaintiff's claims in the instant case are very similar to those alleged in plaintiff's action filed with the Middle District of North Carolina, such that the instant action may be barred by the doctrine of res judicata. However, because defendants did not brief this issue, and the court has determined that plaintiff's complaint should be dismissed on other grounds, the court does not address the application of that doctrine.

Plaintiff has pursued state law judicial review of his administrative appeal against the same defendants in Superior Court in Mecklenburg and New Hanover Counties[3]

On 7 October 1996, plaintiff filed the instant action alleging claims pursuant to 42 U.S.C., Sections 1981 and 1983 and state law breach of contract claims arising out FSU's decision not to reappoint him after the expiration of his contract for the 1989-1990 academic year.

II. STANDARD

For the purposes of a motion made pursuant to Rule 12(b)(6), plaintiff's factual allegations must be taken as true. Republican Party of North Carolina v. Martin, 980 F.2d 943, 952 (4th Cir. 1992), cert. Denied sub nom., Hunt v. Republican Party of North Carolina, 510 U.S. 828 (1993). The Fourth Circuit has stated that "a motion to dismiss for failure to state a claim for relief should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under

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[3] Plaintiff's filings in Mecklenburg Court became so numerous Superior Court Judge Raymond Warren issued an order on 1 August 1996 pursuant to Rule 11(a) of the North Carolina Rules of Civil Procedure, sanctioning plaintiff for expenses incurred by

any state of facts which would be proved in support of his claim." Rogers v. Jefferson-Pilot Life Ins. Co., 883 F.2d 324 (4th Cir. 1989).

Applying Rogers, the question becomes whether the complaint, taken in the light most favorable to the plaintiff complies with Rule 8(a)(2) and establishes that plaintiff is entitled to relief. Dismissal is justified where plaintiff can prove no set of facts which entitle him to relief. See Conley v. Gibson, 355 U.S. 41 (1957). It is also true that a complaint showing that relief is barred by an affirmative defense, such as an applicable statute of limitations, can be subject to dismissal under Rue 12(b)(6). See, e.g., Herron v. Herron, 255 F.2d 589 (5th Cir. 1958).

Defendants assert that plaintiff's claims are barred by the statute of limitations. In support of this assertion, defendants submitted to the court various documents, including declarations, which were outside the pleadings. Because of the submission of such documents, the court must

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defendants because of frivolous motions filed by plaintiff. Plaintiff has failed to comply

treat defendants' motion to dismiss as one for summary judgment. Fed. R. Civ. P. 56. Plaintiff's response included declarations and exhibits outside of the pleadings as well.

A motion for summary judgment may be granted where there are no genuine issues of material facts, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Pachally v. City of Lynchburg, 897 F.2d 723, 725 (4th Cir. 1990).

III. DISCUSSION

Defendants contend that they are entitled to judgment as a matter of law on the grounds that the statute of limitations has run on all plaintiff's claims as of February 1993. Specifically, defendants assert that the appropriate statute of limitations for the federal civil rights claims and state breach of contract claim is three years, and that this time began to run on 8 February 1990 when plaintiff first received notice that he would not be reappointed. Plaintiff's voluminous submissions

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with that order.

to this court in opposition to defendants' motion do not respond to this argument.

Federal civil rights statutes do not provide specifically for limitations on the time in which claims thereunder must be brought. 42 U.S.C., Sections 1981, 1983. Therefore, the proper statute of limitations for such claims must be borrowed from the state statute of limitations wherein the claim arose. Wilson v. Garcia, 471 U.S. 261 (1985); McCausland v. Mason County Bd. Of Educ., 649 F.2d 278 (4th Cir.), cert. Denied, 455 U.S. 1098 (1981); see also 42 U.S.C., Section 1988 (requiring federal courts to borrow statute of limitation from state where claim arose).

Under North Carolina law, the statute of limitation for an action based "[u]pon a liability created by statute, either state or federal" is three years. N.C. Gen. Stat. Section 1-52(2) (1996). Therefore the proper limitation period for plaintiff's claim is three years[4]. See Cox v. Stanton, 529 F.2d 47 (4th Cir.

[4] In McCausland, the court applied the West Virginia statute of limitations for personal injury actions to plaintiff's civil rights claim because West Virginia did not have a statute specifically establishing a limitations period for claims based on alleged civil rights

1975) (affirming district court determination that three year limitation under N.C. Gen. Stat., Section 1-52(2) is proper for civil rights statutory claims). While state law must be applied to determine the relevant time limitation for federal civil rights actions, the time of the accrual of a federal civil rights claim is uniquely a question of federal law. Id. At 50, (citing Kaiser v. Cahn, 510 F.2d 282 (2nd Cir. 1974)); Vanderboom v. Sexton, 422 F.2d 1233 (4th Cir. 1970).

It is settled law that a statute of limitations begins to run when "plaintiff knows or has reason to know of the injury which is the basis of the action." Cox, 529 F.2d at 50 (4th Cir. 1975); DeCostello v. International Bhd. Of Teamsters, 588 F.Supp. 902 (D.Md. 1984). Further, the Supreme Court has held that employment actions brought under federal civil rights statutes accrue from the date of the allegedly discriminatory

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violations. North Carolina similarly does not have a statute creating a time limitation for claims based upon civil rights violations; however, N.C. Gen. Stat., Section 1-52(2) establishes a three year limitation for actions based on federal statutes, and the court has determined this statute to be applicable in the instant case. Further, the North Carolina statute of limitations for injury actions is also three years. N.C. Gen. Stat., Section 1-

discharge. Delaware State College v. Ricks, 449 U.S. 250 (1980) (filing period began to run when tenure decision communicated to professor); see also St. Amant v. Benoir, 896 F.2d 1294 (5th Cir. 1987) (civil rights claim accrued date plaintiff received notification of denial of job transfer); Riel v. Reed, 760 F.Supp. 852 (D. Colo. 1991)(limitation period began to run date employee notified of adverse decision).

The running of a limitation period in civil rights actions may be tolled, but only in the presence of a barrier to bringing the action, or a well-defined exception established by judicial authority. Jolivet v. Elkins, 386 F.Supp. 261 (D.Md. 1974). The pursuit of grievance procedures or administrative appeals does not toll the limitations period, as they are merely remedies for a prior decision and not an opportunity to influence a decision. Ricks, 449 U.S. at 258.

Based on the above case precedent, any civil rights claim plaintiff may have had as a result of his non-reappointment to the FSU faculty began to run on 8 February

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52(16). Regardless of which of these statutes is applied, the result in the case at bar woul

1990, the date he received notice of the non-reappointment. As of that date, plaintiff was indisputably aware that he was not going to be employed by FSU for the upcoming academic year. Plaintiff's attempt to assert that he was notified of his non-reappointment by letter from the FSU Board of trustees dated 14 October 1993 is disingenuous. This letter is simply one of several similar letters which resulted from plaintiff's series of appeals to various administrative bodies and does not constitute the date on which plaintiff's claim accrued.

Further, Judge Ward's Order of 1 March 1996 unequivocally put plaintiff on notice that the legally operative date of his discharge was 8 February 1990, the date of the official notice of non-reappointment from Hackley.

The statute of limitations for breach of contract claims under North Carolina law is three years. N.C. Gen. Stat., Section 1-52(1). As established above, plaintiff received notice of his non-reappointment from Hackley on 8 February 1990. Any breach of contract claim which he may have had

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be the same.

against defendants would have begun to run from that date. His attempt to assert any such claim in this action clearly outside of the limitations period and must be dismissed[5].

There is no dispute that plaintiff first received official notice of his non-reappointment on 8 February 1990. As explained above, the law dictates that this date be used to calculate the beginning of the limitations period. As also explained above, the applicable limitations period is three years. Plaintiff's claims herein were filed on 7 October 1996, well more than three years after the operative date. As such, plaintiff's claims are barred, and defendants are entitled to judgment as a matter of law.

IV. CONCLUSION

For the reasons stated above, defendants' motion for summary judgment is GRANTED and this matter is DISMISSED as to all defendants.

---

[5] Defendants also assert that the Eleventh Amendment to the United States Constitution would bar plaintiff's civil rights and breach of contracts claims against FSU and Hackley and Young in their official capacities because they would enjoy immunity as state officials

This 28 April 1997.

W. EARL BRITT
United States District Judge

tmv/fsu/krh

APPENDIX B

THE UNIVERSITY OF NORTH CAROLINA

General Administration

P.O. Box 2688

Chapel Hill 27515-2688

ELIZABETH BUNTING
Special Assistant to the President

TELEPHONE: (919)962-1000

Confidential

September 16, 1991

Dr. T. M. Viswanathan
Blues Farm Road 1332, Apt. 15
Laurinburg, NC 28352

Dear Dr. Viswanathan:

On Friday, September 13, 1991, the Board of

Because the court has determined that all of plaintiff's claims as to all defendants are barred by the statute of limitations, it does not address this argument.

Governors considered and decided your appeal from the decision of the Board of Trustees of Fayetteville State University. I have enclosed the report adopted by the Board. In summary, the Board found that the decision not to reappoint you could have been based upon an impermissible reason under section 604 of the Code of the University.

Accordingly, the Board reversed the non-reappointment decision and remanded this case back to FSU. As directed by the Board, if you now wish to seek reappointment, you should make such a request to Chancellor Hackley. Such a review would thereafter be initiated at the departmental level.

This notice to you will complete the Board of Governors procedures and action with regard to this case. Please call me if you have questions about this letter or the Board's report.

Sincerely,

(Sd.) _____
Elizabeth C. Bunting

THE UNIVERSITY OF NORTH CAROLINA is composed
of the sixteen public senior institutions in
North Carolina
An Equal Opportunity/Affirmative Action Employer

APPENDIX B

REPORT OF THE COMMITTEE ON PERSONNEL AND TENURE IN THE MATTER OF THE APPEAL OF DR. T.M. VISWANATHAN FAYETTEVILLE STATE UNIVERSITY

ADOPTED BY THE BOARD ON September 13, 1991

Professor Viswanathan was appointed to a one-year tenure-track position as an Associate Professor in the Department of mathematics and Computer Science at Fayetteville State University for the 1989-90 academic year. By letter dated February 8, 1990, he was given timely notice that he would not be reappointed to a second one-year term. He then appealed this decision and was granted a hearing before the FSU Hearing and Reconsideration Committee. At hat hearing, he contended that the decision not to reappoint was based upon personal malice and also that the decision

was an act of retaliation for the exercise of his First Amendment rights.

The Hearing and Reconsideration Committee held the requested hearing on May 8, 1990, and at its conclusion, recommended that the non-renewal decision be reversed; the Committee specifically recommended a "one-year renewal" of Professor Viswanathan's contract. Chancellor Hackley declined to accept this recommendation in a letter dated August 24, 1990, and an appeal was then lodged with the FSU Board of Trustees. After a hearing, that Board upheld the Chancellor's decision. Professor Viswanathan then appealed to the Board of Governors. The matter was referred to this Committee as required by Section 301D of the Code [of the University of North Carolina]. After some discussion, the parties agreed on the content of the record and submitted written arguments in support of their contentions. The matter was then referred to a subcommittee composed of Mr. Pat Taylor, Mr. Adams and Mr. Spaulding.

The subcommittee met on Thursday September 12,

1991, reviewed the record on appeal, considered the written statements of the parties and received their oral presentation. Based upon that record and review, the Committee on Personnel and tenure has received and approved the following subcommittee findings and recommendations.

At the evidentiary hearing before the FSU Hearing and Reconsideration Committee, Professor Viswanathan submitted evidence which tends in summary to show the following chronology:

(1) In the early fall of 1989, Professor Viswanathan made statements at several meetings of the faculty which were quite critical of the academic administration at FSU.

(2) During December 1989, the tenured faculty of the Department of Mathematics and Computer Science recommended that Dr. Viswanathan be reappointed.

(3) On November 11, 1989, the Department Chair of Mathematics and Computer Science signed an evaluation

which recommended Dr. Viswanathan for reappointment as an Associate Professor.

(4) This recommendation was approved by the Dean of the School of arts and Sciences and forwarded to the Office of Vice Chancellor Joseph Monroe.

(5) The FSU Committee on Tenure, Promotion, and Reappointment also recommended reappointment and sent these findings to Dr. Monroe.

(6) On December 4, 1989 at a faculty meeting with the Chancellor, Dr. Viswanathan publicly criticized Dr. Monroe for failing to emphasize publication and research.

(7) On December 7, 1989, Dr. Viswanathan was called to a conference with the Dean, and the Department Chair, where he was told that he needed to "adapt" to the situation at FSU.

(8) On January, 1990, Dr. Monroe wrote a memorandum to Chancellor Hackley recommending that Professor Viswanathan not be reappointed. He indicated in this document that this was based on Professor

Viswanathan's unhappiness with the teaching conditions at FSU. In a later letter, further explaining his reasons for the non-reappointment recommendation, he stated that the professor had "serious problems of adjustment."

(9) Chancellor Hackley accepted this recommendation and so notified Professor Viswanathan in a letter dated February 8, 1990.

The evidence presented tends to show that the negative recommendation of the Vice Chancellor could have been based in part on Professor Viswanathan's critical remarks. Because the remarks appear to be protected speech, this possible motivation on the Vice Chancellor's part would violate the First Amendment to the U.S. Constitution. A decision tainted in this manner would be specifically proscribed under 604B of the Code [of the University of North Carolina].

An appropriate remedy in cases where a non-reappointment decision is based on an impermissible reason is to conduct a new review of the faculty member's

credentials. Such a review should be removed from the prior taint, but should also allow the institution an opportunity to consider the current credentials of the faculty member. To accomplish these ends, the Committee recommends that the non-reappointment decision be reversed and that Professor Viswanathan be given an opportunity to request reappointment as an Associate Professor. This request, if made, should follow the procedures proscribed [sic] by FSU Tenure Regulations and should be initiated at the department level.

(Sd.) _____
John A. Garwood, Chairman
September 13, 1991

APPENDIX B

THE UNIVERSITY OF NORTH CAROLINA

General Administration

ELIZABETH BUNTING
Special Assistant to the President

TELEPHONE: (919)962-1000

June 16, 1992

Dr. Tenkasi M. Viswanathan
Blues Farm Road 1332, Apt. 15
Laurinburg, NC 28352

Dear Dr. Viswanathan:

On Friday, June 12, 1992, the Board of Governors considered and decided your appeal. I enclose the report adopted by the Board.

This notice to you will complete the Board of Governors procedures and action with regard to this case.

Sincerely,

(Sd.)_____
Elizabeth C. Bunting

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APPENDIX B

REPORT OF THE COMMITTEE ON PERSONNEL AND TENURE IN THE MATTER OF THE APPEAL OF DR. T.M. VISWANATHAN FAYETTEVILLE STATE UNIVERSITY

ADOPTED ON June 12, 1992

This is the second appeal of Dr. Viswanathan concerning a non-reappointment decision for the 1990-91 academic year. In the first appeal, Dr. Viswanathan contended that the negative decision resulted from retaliation for his exercise of his right of free speech. After a thorough review of the record of this case, this Committee recommended and the Board adopted the following finding:

> The evidence presented tends to show that the negative recommendation of the Vice Chancellor could have been based in part on Professor Viswanathan's critical remarks. Because the remarks appear to be protected speech, this possible motivation on the Vice Chancellor's part would violate the First Amendment to the U.S. Constitution. A decision tainted in this manner would be specifically proscribed under 604B of the Code [of the University of North Carolina].

As a remedy the Board remanded the case to Fayetteville State University, ordered that Dr. Viswanathan be given an opportunity to request reappointment and specified the nature of this review:

> Such a review should be removed from the prior taint, but should also allow the institution an opportunity to consider the current credentials of the faculty member.

This decision was adopted on September 13, 1991, and shortly thereafter Dr. Viswanathan submitted his credentials to the institution. The new review took place during the 1991-92 academic year and recently culminated in a decision not to reappoint Dr. Viswanathan. This new appeal is grounded on the contention that the new review process did not comply with the Board's order of September 13, 1991. The matter was referred to a subcommittee composed of Mr. Spaulding, Mr. Adams and Dr. Danieley.

The subcommittee met on Wednesday, June 3, 1992, and reviewed the record on appeal and thoroughly considered the contentions raised by Dr. Viswanathan. The Committee on Personnel and Tenure has received and approved the following subcommittee findings and recommendation.

The Board's first decision in this case contemplated a fair and untainted reconsideration of Dr. Viswanathan's request for reappointment. The evidence in the record supports the finding that this second review was consistent with the Board's order. The Committee therefore concludes

and recommends that the decision not to reappoint Dr. Viswanathan be upheld.

(Sd.)_____
John A. Garwood, Chairman
6-12-92
Date

APPENDIX B

NORTH CAROLINA
NEW HANOVER COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

FILE NO. 92 CVS 2024

FILED FEBRUARY 24, 1993

TENKASI M. VISWANATHAN :
Petitioner :
:
vs. :
:
UNIVERSITY OF :
NORTH CAROLINA AND :
FAYETTEVILLE STATE :
UNIVERSITY, :
Respondents :
:

ORDER ON PETITION FOR JUDICIAL REVIEW

THIS CAUSE coming to be heard and being heard before the undersigned Judge of Superior Court on the 8th of February, 1993, the Petitioner being present and represented by Steven J. O'Connor of Rose, Ray, Winfrey & O'Connor, P.A. and the Respondent being represented by Thomas J. Ziko, Special Deputy Attorney General, North Carolina Department of Justice; and the Court having heard the arguments of the parties and having reviewed the record as submitted in the case; the Court finds as follows:

1. This is not a contested case in which an administrative law judge made a recommended decision and therefore the court is not required to make any initial determinations under N.C. Gen. Stat. Section 150B-51(a).

2. The substantial rights of the Petitioner have been prejudiced because the agency's final decision was made upon unlawful procedure under N.C. Gen. Stat. Section 150B-51(b)(3) in that Petitioner was denied the process and procedure set out in Section 5 of the Fayetteville State University Tenure Policies and Regulations, specifically

being a conference with Jon M. Young, Acting Dean of the College of Arts and Sciences, and a hearing before the Fayetteville State University Hearing and Reconsideration Committee to determine whether the decision of John M. Young, Acting Dean of the College of Arts and Sciences, not to reappoint Petitioner to a second one-year appointment was based on impermissible reasons of Petitioner's exercise of rights guaranteed by the First Amendment of the United States Constitution and personal malice. Exception No.2 set out in the Petition for Judicial Review is sustained.

3. The Fayetteville State University Tenure Policies and Regulations did not require that Petitioner be notified of non-reappointment at least 90 days before the end of the 1991-92 academic year (the academic year during which the reappointment review ordered by the University of North Carolina Board of Governors, by order dated September 13, 1991, took place) and failure to give

any such notice was not unlawful procedure under N.C. Gen/. Stat. Section 150B-51(b)(3). Exception No. 3 set out in the Petition for Judicial Review is overruled.

4. Petitioner did not brief or argue Exception No. 1 set out in the Petition for Judicial review and the court hereby overrules such Exception No. 1.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that the agency's final decision in the above-captioned matter is reversed under N.C. Gen. Stat. Section 150B-51(b)(3) and it is ordered that the above-captioned case be remanded to Fayetteville State University, to give Petitioner an opportunity under Fayetteville State University's Tenure Policies and Regulations to have a conference with Jon M. Young, Acting Dean of the College of Arts and Sciences, and the further opportunity to request a review of Jon M. Young's decision by the Fayetteville State University Hearing and Reconsideration Committee, and that further procedure thereafter follow the Fayetteville State University Tenure Policies and Regulations.

This the 19 th day of February, 1993.

(Sd.)
QUENTIN T. SUMNER
SUPERIOR COURT JUDGE PRESIDING

APPENDIX B

FSU FAYETTEVILLE STATE UNIVERSITY
1200 Murchison Road, Newbold Station
Fayetteville, NC 28301-4298
(919)486-1111

OFFICE OF THE
BOARD OF TRUSTEES

October 14, 1993

Dr. T.M. Viswanathan
2615-B Confederate Drive
Wilmington NC 28403

Dear Dr. Viswanathan:

On Tuesday, October 5, 1993, the Board of Trustees of Fayetteville State University considered and decided your appeal. The Board carefully reviewed the entire transcripts, documents, report of the University's Hearing and Reconsideration Committee, the Chancellor's letter of August 2, 1993, as well as your documents of appeal. The

Board did not find that you provided any additional information that supported a reversal of the Chancellor's decision of non-reappointment to the faculty. The Board concluded to accept the Chancellor's decision and confirmed the Chancellor's authority to not reappoint you to a faculty position.

Should you desire to initiate review of this decision, you must submit a written notice of appeal to the Board of Governors within ten (10) days after receipt of this letter. The notice of appeal shall be addressed as follows:

Mr. Samuel H. Poole, Chairman
Board of Governors
c/o The University of North Carolina
910 Raleigh Road
P.O. Box 2688
Chapel Hill, NC 27515-2688

Sincerely,

(Sd.) Hector Mceachern, Chair
Board of Trustees
Fayetteville State University

cc Dr. Lloyd V. Hackley, Chancellor
FSU Board of Trustees

Fayetteville State University is a constituent institution of The University of North Carolina

APPENDIX B

SEAL of the University

THE UNIVERSITY OF NORTH CAROLINA

General Administration
POST OFFICE BOX 2688
CHAPEL HILL, NC 27515-2688

Appalachian State University
East Carolina University
Elizabeth City State University
Fayetteville State University
North Carolina Agricultural and
Technical State University
North Carolina Central University
North Carolina School of the Arts
North Carolina State University at
Raleigh
Pembroke State University
University of North Carolina at Asheville
University of North Carolina at
Chapel Hill
University of North Carolina at Charlotte
University of North Carolina at
Greensboro
University of North Carolina at
Wilmington
Western Carolina University
Winston-Salem State University

An Equal Opportunity
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Employer

ROSALIND FUSE-HALL
Secretary of the University

Telephone (919)962-4615
FAX: (919) 962-2751

September 9, 1994

Dr. T. M. Viswanathan
Post Office Box 295
Newell, North Carolina 28126

Dear Dr. Viswanathan:

The Chairman of the Board of Governors has asked me to convey to you the enclosed copy of the report received and approved by the Board at its meeting held on September 9, 1994. This constitutes final University disposition of the question you advanced to the Board.

Sincerely,
(Sd.)_____
Rosalind Fuse-Hall

Enclosure
cc: Chancellor L.V. Hackley

APPENDIX B

REPORT OF THE COMMITTEE ON UNIVERSITY GOVERNANCE IN THE APPEAL OF T.M. VISWANATHAN

We bring to you today the appeal of a faculty member at Fayetteville State University. This case began in February 1990, when Dr. T.M. Viswanathan sought review of a

decision not to renew his tenure track contract as an Associate Professor in the Department of Mathematics and Computer Science. The FSU faculty Hearing and Reconsideration Committee disagreed with the nonrenewal decision. Chancellor Hackley, however, determined that the evidence did not support a finding of impermissible reasons and that the nonrenewal decision should stand. His decision was sustained by the FSU Board of Trustees.

On appeal to the Board of Governors, the Chancellor's decision was reversed and the case was remanded to FSU. Because there was some evidence that Dr. Viswanathan could have been penalized for a speech he had made on campus, the matter was remanded to FSU. When this decision was made on September 16, 1991, the faculty roster had been set for the 1991-1992 academic year. Thus, as a remedy, the Board of Governors directed that Professor Viswanathan be given an opportunity to apply for a new position in the Department of Mathematics and Computer Science for the 1992-93 academic year.

Thereafter Dr. Viswanathan did submit an application for employment and this was referred to the department chair. Although the math faculty recommended that a position be offered, the chair determined that Dr. Viswanthan's credentials did not match the department's instructional needs. This recommendation not to offer an appointment was forwarded to the Dean and the Vice Chancellor who both agreed with the chair's decision. Based upon these reviews, the Chancellor notified Dr. Viswanathan that a position would not be offered to him.

In a letter to President Spangler, Dr. Viswanathan questioned this outcome and asked whether the institutional decision complied with the Board's September 1991 order. The matter was then referred back to the Board which found in a decision dated June 12, 1992 that the review at FSU was consistent with the Board's earlier decision.

Professor Viswanathan then sought to appeal the decision not to offer him an appointment through the campus procedures for non-reappointment cases. When these

avenues were not made available to him, he filed suit in New Hanover County Superior Court, contending that he had a right to a campus review. The court agreed that he had a right to review in accord with the FSU procedure and ordered that this process should begin. The institutional steps of conference and a review before the Hearing and Reconsideration Committee began in March 1993.

In the administrative chain, the Dean and the Vice Chancellor met with Dr. Viswanathan and considered his contentions. Each of these officials, however, recommended that he not be appointed. Thereafter, Dr. Viswanathan sought review from the faculty Hearing and Reconsideration Committee. Although this committee found that there was evidence of impermissible reasons, the Chancellor did not accept this recommendation; he determined that the associate professor position would not be offered to Dr. Viswanathan. This decision was then sustained by the FSU Board of Trustees.

After an appeal was filed with the Board of Governors, the case was referred to the Committee on University Governance for its review and recommendation. A hearing was conducted on July 8, 1994, at which time presentations were made by Dr. Viswanathan and his attorney, and by Ms. Lessane on behalf of the Chancellor. After a thorough review of the Record, the written contentions of the parties and oral presentations made during this appeal, the Committee has made the following findings: First, we recognized that because the remedy directed by the Board after the first appeal was an opportunity to make application for a position, this case might be considered a review of refusal to hire. The Board has held in several recent cases that there is no appellate jurisdiction for such a review, and on this precedent, we found that the decision of the FSU Board of Trustees should be sustained. Second, we also recognized that this case initially was considered as an appeal from a decision not to reappoint a faculty member to a tenure track position. Because of this posture, we have also

undertaken a review as to whether Dr. Viswanathan carried his burden of proving that the institutional decision was based upon an impermissible reason. Considering all of the written submissions and oral presentations, we found that the burden of proof was not carried by Dr. Viswanathan in this case.

Thus, for all of the foregoing reasons, we recommend to you that the decision of the FSU Board of Trustees be sustained. Dr. Viswanathan has not shown he was improperly denied a position in the Department of Mathematics and computer Sciences at Fayetteville State University.

(Sd.) Mrs. Maxine H. O'Kelley, Chairman
Committee on University Governance

Sept. 9, 1994
(date)
Received and approved by
The Board of Governors
September 9, 1994
(Sd.) Rosalind Fuse-Hall, Secretary
The University of North Carolina

Sept. 9, 1994
(date)

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
November 4, 1997

No. 97-1735
CA-96-160-7-BR

Dr. Tenkasi M. VISWANATHAN,

Plaintiff-Appellant,

versus

FAYETTEVILLE STATE UNIVERSITY BOARD OF TRUSTEES, DR. LLOYD V. HACKLEY, Chancellor of Fayetteville State University, in his official and individual capacity; Dr. JON YOUNG in his official and individual capacity,

Defendants-Appellees.

ORDER

Appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX D

TENURE POLICIES AND REGULATIONS OF FAYETTEVILLE STATE UNIVERSITY

SECTION 1. FREEDOM AND RESPONSIBILITY IN THE UNIVERSITY COMMUNITY

Fayetteville State University is dedicated to the transmission and advancement of knowledge and understanding. Academic freedom is essential to the achievement of these purposes. This institution, therefore, supports and encourages freedom of inquiry for faculty members and students, to the end that they may responsibly pursue these goals through teaching, learning, research, discussion, and publication, free from internal or external restraints that would unreasonably restrict their academic endeavors.

Fayetteville State University shall protect faculty and students in their responsible exercise of the freedom to teach, to learn, and otherwise to seek and speak the truth.

Faculty and students of this institution shall share in the responsibility for maintaining an environment in which academic freedom flourishes and in which the rights of each member of the academic community are respected.

APPENDIX D

TENURE POLICIES AND REGULATIONS OF FAYETTEVILLE STATE UNIVERSITY

SECTION 2. ACADEMIC FREEDOM AND RESPONSIBILITY OF FACULTY

It is the policy of Fayetteville State University to support and encourage full freedom, within the law, of inquiry, discourse, teaching, research, and publication for all members of the academic staffs of this institution. Members of the faculty are expected to recognize that accuracy, forthrightness, and dignity befit their association with this institution and their position as men and women of learning. They should not represent themselves, without authorization, as spokesmen for Fayetteville State University.

Fayetteville State University will not penalize or discipline members of the faculty because of the exercise of

academic freedom in the lawful pursuit of their respective area of scholarly and professional interest and responsibility.

APPENDIX D

TENURE POLICIES AND REGULATIONS OF FAYETTEVILLE STATE UNIVERSITY

SECTION 3. ACADEMIC TENURE

Subsection A. GENERAL

Academic tenure refers to the conditions and guarantees that apply to a faculty member's employment. More specifically, it refers to the protection of a faculty member against involuntary suspension or discharge from employment or reduction in rank by Fayetteville State University except upon specified grounds and in accordance with the procedures provided in Section 4 and against termination of employment except as provided for in Section 6.

Academic tenure for faculty members is intended to secure their academic freedom and to help the institution

attract and retain faculty members of high quality. While academic tenure may be withheld on any grounds except those specifically stated to be impermissible under Section 5.A., a recommendation of permanent tenure requires that the faculty member's demonstrated professional competencies, his potential for future contributions, and institutional needs and resources be assessed.

Subsection B.

IN RELATION TO FACULTY RANKS

Academic tenure, as herein described, pertains exclusively to the employment of faculty members by appointment to specific faculty ranks. Such appointments may be for fixed terms of employment, automatically terminable when they expire (fixed term appointment); or they may be for probationary terms (probationary term appointment); or they may be continuous until retirement, death, or resignation (appointment with permanent tenure).

The faculty ranks to which appointments may be made and the incidents of academic tenure applicable to each are:

(1) **Instructor.** . . .

(2) **Assistant Professor.** . . .

(3)

Associate Professor. When a faculty member's initial appointment by the institution is to the rank of associate professor, the appointment shall be to a probationary term of one year. Unless at any point the associate professor is not reap-pointed, he shall be reappointed to a second one-year term and then to a three-year term before a decision is made whether to recommend permanent tenure at the same or higher rank or to offer a terminal appointment of one academic year. At least 90 days before the end of his first one-year appointment, the associate professor shall be given written notice whether, when his current term expires, he will be reappointed at the

rank of associate professor for another one-year term or not reappointed. At least 180 days before the end of his second consecutive one-year appointment, he shall be given written notice whether, when his current term expires, he will be reappointed at the rank of associate professor for a three-year term or not reappointed.

Before the end of the second year of his three-year term, he shall be given written notice whether he will be recommended for permanent tenure at the same or higher rank when his current term expires or not reappointed.

Failure to give the required notice of a decision not to reappoint at any point herein required has the same effect as a decision at that time to offer a terminal appointment at the same rank for one academic year. The decision herein required shall be made as provided in Section 3.C.

A promotion at any time from the rank of associate professor to that of professor confers permanent tenure from the effective date of the promotion. Since this promotion confers tenure, it must be finally approved by the president and the Board of Governors of the University of North Carolina.

(4) **Professor.**

(5) **Special Faculty Appointments.**

Subsection C.

GENERAL PROVISIONS

(1)

Initiation, Review, and Approval of Appointments, Pro-motions, and Reappointments. Each initial appointment with a fixed or probationary term, **each** promotion in rank, each reappointment to a fixed term, and each reappointment of an instructor, assistant professor, associate professor, or professor, whether or not the reappointment recommends the

conferral of permanent tenure shall be initiated by recommendation of the chairman of the department[6] concerned. In making a recommendation, the chairman shall consult with the department's assembled tenured faculty members. If the department has too few tenured faculty members to give a representative view of departmental opinion, the chairman shall consult with the senior members of the department who are familiar with the work of the candidate being considered.

The chairman's recommendation shall be sent to the division chairman, who shall forward it with his recommendation to the provost/ vice chancellor for academic affairs. The provost/vice chancellor will attach his recommendation and then forward all recommend-recommendations to the

---

[6] "Department" is used herein as a generic term for departments and any other academic units to which faculty appointments are made. "Chairman" as a generic term for department chairman and any other heads of academic units to which faculty appointments are made.

chancellor. The chancellor, in arriving at this decision, shall consult with the Committee on Tenure, Promotion, Appointments, and Reappointment.[7]

If the chancellor decides not to recommend reappointment, promotion, or permanent tenure, he shall give the faculty member being considered a simple, unelaborated, written statement of the decision. This decision is final except as it may later be reviewed in accordance with the provisions of Section 5. If the chancellor concurs in a recommendation that will confer permanent tenure, he shall consult with the Board of Trustees and, unless dissuaded, forward, the recommendation to the president and Board of Governors for approval. All other favorable recommendations by the chancellor in regard to appointments, reappointments, and promotions shall be forwarded by him to the Board of

---

[7] See the current constitution of the Fayetteville State University Senate for the composition of this committee.

Trustees for final approval unless the board delegates the authority to give final approval.

(2)

Decision Not to Reappoint Upon Expiration of Probationary Terms. The decision not to reappoint when a probationary term appointment as instructor, assistant professor, associate professor, or professor expires shall be made by the chairman of the department concerned after consulting with the department's assembled tenured faculty. If the department has too few tenured faculty members to give a representative view of departmental opinion, the chairman shall consult with senior members of the department who are familiar with the work of the candidate for reappointment. The chairman's decision is final except as it may be later reviewed in accordance with the provisions of Section 5. The chairman shall notify the faculty member of his decision by a simple, unelaborated statement that the

faculty member will not be reappointed. Each decision not to reappoint shall be communicated for information through the administrative channels prescribed for review had the decision been to reappoint.

(3) Early Promotion and Tenure.

(4) Visiting Faculty Members.

(5)

Terms and Conditions of Appointments.

The terms and conditions of each appointment and each reappointment to the faculty shall be set out in writing. A copy of the terms, signed by the chancellor, shall be delivered to the faculty member, and the chancellor shall retain a copy. The general terms and conditions of such appointments, including those provided herein, shall be either set out in the document of appointment or incorporated therein by clear reference to specified documents that shall be readily available to the faculty member.

Any special terms and conditions shall be clearly stated in the written appointment. Except as herein provided, no special terms or conditions may be included that vary with the general terms and conditions stated herein. The responsibility for initiating the inclusion of special terms and conditions in documents of appointments shall be with the chairman who recommends the appointment.

APPENDIX D

TENURE POLICIES AND REGULATIONS OF FAYETTEVILLE STATE UNIVERSITY

SECTION 5.

NONREAPPOINTMENT OF FACULTY MEMBERS ON PROBATIONARY APPOINTMENTS

Subsection A.

PERMISSIBLE AND IMPERMISSIBLE GROUNDS FOR NONREAPPOINTMENT

The decision whether to reappoint a faculty member when a probationary term appointment expires may be based on any factor considered relevant to the total institutional

interests, but it must consider the faculty member's demonstrated professional competence, his potential for future contributions, and institutional needs and resources. These considerations may form, in whole or in part, the basis of the ultimate decision, except that a decision not to reappoint may not be based upon (1) the faculty member's exercise of rights guaranteed by either the First Amendment to the United States Constitution or Article I of the North Carolina Constitution; (2) discrimination based upon the faculty member's race, sex, religion, or national origin; or (3) personal malice.

Subsection B.

CONFERENCE WITH DEPARTMENT CHAIRMAN

Within five days after receiving a written notice of non-reappointment, a faculty member may in writing request a private conference with his department chairman[6] to discuss

---

[6] If the initial decision not to reappoint is made by an administrative officer other than the chancellor, substitute the name of that administrative officer for department chairman wherever the latter phrase appears. If the initial decision not to reappoint is made by

the reasons for non-reappointment. This request shall be granted and the conference held forthwith, within five days after receipt of the request if possible.

Within five days after the conference, the department chairman shall give the faculty member a simple, unelaborated, written statement of whether the original decision remains in effect.

Subsection C.

CONFERENCE WITH SUPERVISOR OF DEPARTMENT CHAIRMAN

Within five days after receiving notice that the original decision remains in effect, the faculty member may in writing request a conference with the department chairman's immediate administrative supervisor. This request shall be granted and the conference held forthwith, within five days after receipt of the request if possible.

---

the chancellor or Board of Trustees, the faculty member who is not to be reappointed may seek review of that decision in accordance with the procedure set out in Section 501©(4) of The Code.

Within ten days after this conference, the reviewing administrative officer shall send a written evaluation of the matter to the faculty member and to the department chairman. The evaluation may be in the form of an unelaborated concurrence with the decision; an expression of disagreement with the decision, with or without supporting reasons; or a recommendation for reconsidering the decision, with or without suggestions for specific procedures for the reconsideration. Whatever form the evaluation may take, it is merely recommendatory and is not binding upon the department chairman or final as to the faculty member.

Within five days after receipt of an evaluation that disagrees with the decision or recommends its reconsideration, the department chairman shall give the faculty member and his immediate supervisor his response in writing.

Subsection D.

REQUEST FOR AND SCOPE OF REVIEW BY HEARING AND RECONSIDERATION COMMITTEE

Within five days after he receives notice of an unfavorable action resulting from the conference with the department chairman's supervisor, the faculty member may request that the Hearing and Reconsideration Committee review the decision. This review is limited solely to determining whether the decision not to reappoint was based upon any of the grounds stated to be impermissible in Subsection A of this section.

The request for review shall be written and addressed to the chairman of the committee. It shall specify the grounds upon which the faculty member contends that the decision was impermissibly based, with a short, plain statement of facts that the faculty member believes supports the contention.

Such a request constitutes on the faculty member's part: (1) a representation that he can prove his contention, and (2) an agreement that the institution may offer in rebuttal of his contention any relevant data within its possession.

The Hearing and Reconsideration Committee shall consider the request and grant a hearing if it determines that (a) the request contains a contention that the decision was impermissibly based under this section, and (b) the facts suggested, if established, will support the contention. A denial of the request finally confirms the decision. If the request is granted, a hearing shall be held within ten days after the request is received; the faculty member shall be given at least five days' notice of the hearing.

Subsection E.

CONDUCT OF HEARING

The hearing shall be conducted informally and in private. Only the members of the hearing committee, the faculty member, the department chairman, and such witnesses as may be called may attend, except that the faculty member and the department chairman may each be accompanied by a person of his choosing. A quorum for the hearing is a simple majority of the total committee membership. Committee members who hold an appointment

in the faculty member's department, who will testify as witnesses, or who have any other conflict of interest are disqualified from participating in that hearing. If the faculty member requests it and the chairman of the committee approves, a transcript of the proceedings shall be made and provided to the faculty member. The committee may consider only such evidence as is presented at the hearing and need consider only the evidence offered that it considers fair and reliable. All witnesses may be questioned by the committee members, the faculty member, the department chairman, and the representatives of the faculty members and chairman. Except as herein provided, the conduct of the hearing is under the committee chairman's control.

Subsection F.

HEARING PROCEDURE

The hearing shall begin with the faculty member's presentation of contentions, which shall be limited to those grounds specified in the request for a hearing and supported by such proof as he desires to offer. When the faculty

member has concluded this presentation, the committee shall recess to consider whether he has established a prima facie case. If it determines that the contention has not been so established, it shall notify the parties to the hearing and thereupon terminate the proceedings. Such termination confirms the decision not to reappoint. If it determines that rebuttal or explanation is desirable, it shall notify the parties and the hearing shall proceed. The department chairman may then present rebuttal of the faculty member's contentions, or in general support of the decision not to renew, such testimonial or documentary proofs as he desires to offer, including his own testimony.

At the end of this presentation, the Hearing and Reconsideration Committee shall consider the matter in executive session. The burden is upon the aggrieved faculty member to satisfy the committee that his contention is true.

Subsection G.

PROCEDURE AFTER HEARING

If the Hearing and Reconsideration Committee determines that the faculty member's contention has not been established, it shall, by a simple unelaborated statement, so notify him, the department chairman, and the department chairman's immediate supervisor. Such a determination confirms the decision not to reappoint. If the Hearing and Reconsideration Committee determines that the faculty member's contention has been satisfactorily established, it shall so notify him, the department chairman, and the department chairman's immediate supervisor by a written notice that shall also include a recommendation for corrective action by the department chairman.

Within five days after receiving such a recommendation, the department chairman shall notify the faculty member, his own immediate supervisor, and the chairman of the Hearing and Reconsideration Committee what modifications, if any, he will make with respect to the original decision not to reappoint.

If the department chairman fails to make a recommended modification in the original decision, the Hearing and Reconsideration Committee shall submit a report to the Chancellor containing the committee's findings and recommendation and what it considers to be appropriate action by the chancellor to resolve the matter.

APPENDIX E

THE CODE

BOARD OF GOVERNORS

THE UNIVERSITY OF NORTH CAROLINA

CHAPTER VI

ACADEMIC FREEDOM AND TENURE

SECTION 501 C.

Relation of the President to the University

Subsection (4) Subject to such regulations and limitations as may be prescribed by the Board of Governors, the faculties, staffs and student bodies of the constituent institutions, or any member thereof, may have the right to appeal the disposition of grievances to the Chancellor, and from the

Chancellor to the President, and from the President to the Board of Governors; provided, that appeals based on policies, rules or regulations adopted by the Board of Trustees shall be addressed initially to the Chancellor, and from the Chancellor to the Board of Trustees, and, where allowed, from the Board of Trustees to the Board of Governors; however, all appeals addressed to or request for hearings by the Board of Governors, from whatever source, shall be transmitted through the President.

APPENDIX E

THE CODE

BOARD OF GOVERNORS

THE UNIVERSITY OF NORTH CAROLINA

SECTION 502

CHANCELLORS OF CONSTITUENT INSTITUTIONS

Subsection 502 C.(4)

The Chancellor shall be the official

medium of communication between the Board of Trustees and all individuals, officials, agencies and organizations, both within and without the institution.

APPENDIX E

THE CODE

BOARD OF GOVERNORS

THE UNIVERSITY OF NORTH CAROLINA

CHAPTER VI

ACADEMIC FREEDOM AND TENURE

SECTION 600

FREEDOM AND RESPONSIBILITY IN THE UNIVERSITY COMMUNITY

(1) The University of North Carolina is dedicated to the transmission and advancement of knowledge and understanding. Academic freedom is essential to the achievement of these purposes. The University, therefore, supports and encourages freedom of inquiry for faculty members and students, to the end that they may responsibly pursue these goals through teaching, learning, research, discussion, and publication, free from internal or

external restraints that would unreasonably restrict their academic endeavors.

(2) The University and each constituent institution shall protect faculty and students in their responsible exercise of the freedom to teach, to learn, and otherwise to seek and speak the truth.

Faculty and students of The University of North Carolina shall share in the responsibility for maintaining an environment in which academic freedom flourishes and in which the rights of each member of the academic community are respected.

APPENDIX E

THE CODE

BOARD OF GOVERNORS

THE UNIVERSITY OF NORTH CAROLINA

CHAPTER VI

ACADEMIC FREEDOM AND TENURE

SECTION 601

ACADEMIC FREEDOM AND RESPONSIBILITY OF FACULTY

(1) It is the policy of The University of North Carolina to support and encourage full freedom, within the law, of inquiry, discourse, teaching, research, and publication for all members of the academic staffs of the constituent institutions. Members of the faculty are expected to recognize that accuracy, forthrightness, and dignity befit their association with this institution and their position as men and women of learning. They should not represent themselves, without authorization, as spokesmen for The University of North Carolina or any of its constituent institutions.

(2) The University and its constituent institutions shall not penalize or discipline members of the faculty because of the exercise of academic freedom in the lawful pursuit of their respective area of scholarly and professional interest and responsibility.

APPENDIX E

THE CODE

BOARD OF GOVERNORS

THE UNIVERSITY OF NORTH CAROLINA

CHAPTER VI

ACADEMIC FREEDOM AND TENURE

SECTION 602

ACADEMIC TENURE

(1) To promote and protect the academic freedom of its faculty, the Board of Trustees of each constituent institution shall adopt policies and regulations governing academic tenure.

(2) ...

(3) The tenure policies and regulations of each constituent institution shall prescribe the procedures by which decisions concerning appointment, reappointment, promotion and the conferral of permanent tenure shall be made. The lengths of terms of appointment that do not carry permanent tenure and those faculty ranks or

titles whose holders shall be eligible for permanent tenure shall be prescribed. The institutional policies and regulations also shall prescribe the intervals at which the review of candidates for reappointment and promotion, including the conferral of permanent tenure, shall occur.

The tenure policies and regulations of each institution, which shall include the complete text of Chapter Six of the Code, shall be published by the institution and distributed to its faculty members.

(4) ...

(5) ...

(6) Institutional tenure policies and regulations shall distinguish among the following:

(a) the non-reappointment (or nonrenewal) of a faculty member at the expiration of a specific term of service;

APPENDIX E

THE CODE

BOARD OF GOVERNORS

THE UNIVERSITY OF NORTH CAROLINA

CHAPTER VI

ACADEMIC FREEDOM AND TENURE

SECTION 604

APPOINTMENT, NONREAPPOINTMENT AND REQUIREMENTS OF NOTICE AND REVIEW

SECTION 604 A.
Notice of Reappointment or Non-reappointment

(1) The decision not to reappoint a faculty member at the expiration of a fixed term of service shall be made by the appropriate institutional faculty and administrative officers early enough to permit timely notice to be given. For full-time faculty at the rank of instructor, assistant professor, associate professor or professor, the minimum requirement for timely notice shall be as follows:

(a) during the first year of service at the institution. The faculty member shall be given not less than 90 calendar days' notice before his employment contract expires;

(b) during the second year of continuous service at the institution, the faculty member shall be given not less than 180 calendar days' notice before his employment contract expires;

(c) after two or more years of continuous service at th institution, the faculty member shall be given not less than twelve months' notice before his employment contract expires.

(2) Notice of reappointment or nonreappointment shall be written. If the decision is not to reappoint, then failure o give timely notice of nonreappointment will oblige the Chancellor thereafter to offer a terminal appointment of one academic year.

APPENDIX E

THE CODE

BOARD OF GOVERNORS

THE UNIVERSITY OF NORTH CAROLINA

SECTION 604 B.

Impermissible Reasons for Nonreappointment

In no event shall a decision not to reappoint a faculty member be based upon (a) the exercise by the faculty member of rights guaranteed by the First Amendment to the United States Constitution, or by Article I of the North Carolina Constitution, or (b) discrimination based upon the faculty member's race, sex, religion, or national origin; or (c) personal malice.

APPENDIX E

THE CODE

BOARD OF GOVERNORS

THE UNIVERSITY OF NORTH CAROLINA

APPENDIX [TO THE CODE]

DELEGATIONS OF DUTY AND AUTHORITY TO BOARDS OF TRUSTEES

[As adopted by the Board of Governors, 7/7/72, and amended through 8/1/88]

Pursuant to authority vested in it by the General Statutes, and consistent with the provisions of the Code of

The University of North Carolina, the Board of Governors hereby delegates to the Boards of Trustees of the constituent institutions of The University of North Carolina the following duties and powers:

I. ACADEMIC AND ADMINISTRATIVE PERSONNEL

A. Appointment and Compensation

1. With respect to all faculty positions with permanent tenure and all senior administrative positions, namely vice chancellors, provosts, deans, and directors of major educational and public service activities, the Chancellor, following consultation with the Board of trustees, shall forward to the President recommendations with respect to such appointments, promotions and compensation; if the president concurs in such recommendations, he shall forward them to the Board of governors for approval.

2. With respect to all faculty and administrative positions, other than those identified in subparagraph 1 above, and other than those subject to the State Personnel act, the Chancellor shall forward his

recommendations for appointment, promotion and compensation to the Board of Trustees; subject to applicable provisions of the University Code and to such policies as may be established by the Board of Governors, the action of the Board of Trustees with respect to such personnel action shall be final.

APPENDIX F

CIVIL RIGHT STATUTES

42 U.S.C. SECTION 1981

EQUAL RIGHTS UNDER THE LAW

(a) **Statement of equal rights**

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) **"Make and enforce contracts" defined**

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

© **Protection against impairment**

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

(As amended Pub. L.102-166, title I. Section 101, November 21, 1991, 105 Stat.1071.)

Amendments 1991 – Pub. L.102-166 designated existing provisions as subsec. (a) and added subsect. (b) and ©.

APPENDIX F

42 U.S.C. SECTION 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

Territory, or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX G

Judicial Review Statute

N.C.G.S. CHAPTER - 150B: ARTICLE 4

N.C.G.S. Section 150B-43. Right to judicial review.

Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such

other statute. Nothing in this Chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this Article.

N.C.G.S., Section 150B-51. Scope of Review

(b) Standard of Review. --- . . . the court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency" findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions;

(2) In excess of statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

Supreme Court, U.S.
FILED
APR 2 1998
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No. 97-1271

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

TENKASI M. VISWANATHAN,
Petitioner,

v.

BOARD OF TRUSTEES OF FAYETTEVILLE
STATE UNIVERSITY, *et al.*
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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17 pp

QUESTIONS PRESENTED

1. Are the lower courts' rulings consistent with this Court's precedent and relevant state law establishing that Petitioner's claims were barred by the statute of limitations?

2. Were Petitioner's claims are legally insufficent, independent of the operation of the statute of limitations?

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No. 97-1271

IN THE
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TENKASI M. VISWANATHAN,
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v.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

TO THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES:

Respondents Board of Trustees of Fayetteville State University (FSU) *et al.*, the Honorable Michael F. Easley, Attorney General of North Carolina, and Celia Grasty Jones, Assistant Attorney General, request this Court to deny the PETITION FOR WRIT OF

CERTIORARI filed by petitioner T. M. Viswanathan, which was placed on the docket on February 4, 1998. Petitioner seeks review of the decision of the United States Court of Appeals for the Fourth Circuit, entered on September 19, 1997, which affirmed *per curiam* the April 28, 1997 decision of the United States District Court for the Eastern District of North Carolina granting Respondents' motion to dismiss Petitioner's complaint pursuant to Rule 12(b)(6) and Rule 56 of the Federal Rules of Civil Procedure.

This brief in opposition to the Petition is timely, for pursuant to Rule 30.4 Respondents sought from the Clerk and received an extension of the time allowed to respond, to and including April 2, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, *Viswanathan v. Fayetteville State University Board of Trustees et al.*, 125 F.3d 850 (1997), is unpublished. A copy of the slip opinion is found in Petitioner's Appendix (Pet. App.) at pp. 1-3.

The memorandum opinion of the United States District Court for the Eastern District of North Carolina, Southern Division, *Dr. Tenkasi M. Viswanathan v. The Fayetteville State University Board of Trustees et al.*, 7:96-CV-160-BR(3), April 28, 1997, is unpublished. A

copy of the judgment and order appears in Pet. App. at pp. 3-17.

JURISDICTION

Petitioner seeks jurisdiction of this Court to review the Court of Appeals' decision pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment XIV; 42 U.S.C. §§ 1981 and 1983.

STATEMENT OF THE CASE

The essential facts of this matter are adequately summarized in the District Court's Order (Pet. App. at pp. 5-17).

REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED

I. THE LOWER COURTS CORRECTLY DETERMINED, IN ACCORDANCE WITH THIS COURT'S PRECEDENT AND RELEVANT STATE LAW, THAT PETITIONER'S CLAIMS WERE BARRED BY THE STATUTE OF LIMITATIONS.

The District Court correctly held, and the Fourth Circuit Court of Appeals correctly affirmed, that Petitioner failed to state viable federal civil rights or state breach of contract claims, for those claims were barred at the time of filing the complaint by the applicable statute of limitations.

As the District Court found, limitations periods for the federal civil rights statutes are borrowed from the statute of limitations operative in the state in which the claim arose. (Pet. App. p. 12, *citing Wilson v. Garcia,* 471 U.S. 261 (1985); *McCausland v. Mason County Board of Education,* 649 F.2d 278 (4th Cir.), *cert. denied,* 454 U.S. 1098 (1981)); *see also* 42 U.S.C. § 1988. In North Carolina, the statute of limitations for an action based "[u]pon a liability created by statute, either state or federal" is three years. N.C. GEN. STAT. § 1-52(2) (1996); *see also* N.C. GEN. STAT. § 1-52(16) (1996) (establishing three-year limitations period for injury actions). The

same limitations period applies to state law contract claims. N.C. GEN. STAT. § 1-52(2).

The District Court properly applied this Court's precedent in holding that the three-year limitations period began to run for Petitioner on February 8, 1990, the date Petitioner -- then employed by Fayetteville State University (FSU) on a one-year term appointment -- received notice that he would not be reappointed to another term of employment, and, therefore, that his employment at FSU would cease when the term under which he was then serving ended on May 15, 1990. (Pet. App. pp. 13-14, *citing Delaware State College v. Ricks*, 449 U.S. 250 (1980) (limitations period began to run when decision not to grant tenure was communicated to professor); *St. Amant v. Benoit,* 806 F.2d 1294, 1298 (5th Cir. 1987) (civil rights claim accrued on date plaintiff received notification of job transfer)). Petitioner's pursuit of a remedy for this decision through FSU's administrative appeals procedure did not toll the limitations period. *Delaware v. Ricks,* 449 U.S. at 258 (filing period was not tolled by professor's grievance of college's tenure decision); *Chardon v. Fernandez,* 454 U.S. 6, 8 (1981) *(per curiam)* (limitations period for filing Section 1983 claims began to run upon termination decision and notification, not when employment was subsequently actually terminated). *See also Wilson v. Crab Orchard Development Co.*, 276 N.C. 198, 214, 171 S.E.2d 873, 884 (1970) (pursuit of another remedy does

not extend time allowed by statute for institution of an action). Accordingly, his time for filing any claim arising from the non-reappointment decision under either the federal civil rights statutes or state law breach of contract expired February 8, 1993. Petitioner did not file the present complaint until October 7, 1996, long after the limitations bar had foreclosed his claims. Moreover, assuming *arguendo* that Petitioner's access to a second reappointment review during the appeal process did toll the limitations period that began running on February 8, 1990, the present complaint would still be untimely. Following that second review, Petitioner had his final notice that FSU would not employ him again by Chancellor Lloyd Hackley's letter to that effect dated August 2, 1993. Even allowing a full three years from that date, Petitioner's October 1996 filing is unquestionably outside the statute of limitations.

As the Court of Appeals affirmed, the District Court correctly applied the legal standards this Court has established for the time limitations and accrual of federal civil rights actions, and correctly applied the governing statute of limitations for breach of contract claims under North Carolina law. Therefore, Respondents submit that this Court, in its discretion, should decline Petitioner's request for review.

II. PLAINTIFF'S CLAIMS ARE LEGALLY INSUFFICIENT, INDEPENDENT OF THE OPERATION OF THE STATUTE OF LIMITATIONS.

By his receipt of the March 1, 1996 order of the United States District Court for the Middle District of North Carolina in his previous federal litigation (1:94 CV 00528), Petitioner indisputably had notice when he filed the present complaint that the legally operative date of notification of his separation from FSU was February 8, 1993. Nevertheless, throughout this litigation Petitioner has continued his disingenuous and so far unsuccessful attempt to convince another federal court that his due process and contract claims are viable because during the administrative appeal of his non-reappointment he obtained an order permitting him to apply again for an appointment. On at least three grounds independent of the operation of the statute of limitations, this effort is patently meritless as a matter of law.

First, as Petitioner himself acknowledged, *he was no longer employed at FSU as of May 15, 1990, the end of his sole contractual term of employment.* (Pet. App. p. 7). *After that date, there was no contract to be either renewed or breached.* The September 16, 1991 recommendation of the Board of Governors of The University of North Carolina that Petitioner be given an opportunity to request another appointment did not

reinstate Petitioner to any form of employment, contractual or otherwise.

Second, even assuming *arguendo* that Petitioner's present complaint was timely, he could still have no legally viable claim under 42 U.S.C. § 1983 for alleged due process violations in his nonreappointment or its appeal, for his one-year term appointment accorded him no constitutionally protected property right in the continuation of his employment. His interest in employment at FSU was created and defined by the terms of a contract that supported "absolutely no possible claim of entitlement to re-employment." *Board of Regents v. Roth*, 408 U.S. 564, 577-78 (1972). See also *Kilcoyne v. Morgan*, 664 F.2d 940 (4th Cir. 1981), *cert. denied*, 456 U.S. 928 (1982) (it is well-established that faculty members with terminal contracts have no property rights to continued employment that are entitled to due process protection). *Accord Pressman v. UNC-Charlotte*, 78 N.C. App. 296, 302-03, 337 S.E.2d 644, 648-49 (1985), *cert. granted*, 315 N.C. 589, 341 S.E.2d 28 (1986).

The only right Petitioner enjoyed was access to a three-level post-termination appeal process, granted by the FSU Tenure Policies and Regulations for appeals of non-reappointment decisions allegedly based on one or more of three specified impermissible reasons. Because Petitioner had no property right in continued employment,

however, he had neither a *constitutional* entitlement to any sort of appeal hearing nor a legal claim for deprivation of Fourteenth Amendment due process arising from an alleged violation of the procedures established by state law or regulation for the conduct of any hearing he might have been afforded. *Board of Regents v. Roth,* 408 U.S. at 578; *Gryger v. Burke,* 334 U.S. 728, 731 (1948); *Clark v. Link*, 855 F.2d 156, 163 (4th Cir. 1988); *Riccio v. County of Fairfax,* 907 F.2d 1459, 1466 (4th Cir. 1990). The decisions from various states that Petitioner has cited in support of his theory that "contractual rights" were conferred either from the Board of Governors' recommendation or from provisions in the FSU Tenure Policies and Regulations are completely inapposite both to his own employment situation and to the threshold legal requirement for a valid due process claim under Section 1983. *See* Pet. App. p. 26 (citing state court decisions involving limitations on at will employment arising from employee handbooks).

Finally, any claim under 42 U.S.C. § 1981 arising from Petitioner's expired contract with FSU would, even if timely, be dismissable as well. 42 U.S.C. § 1983 is the exclusive federal remedy for the violation of rights guaranteed by 42 U.S.C. § 1981 when the claim is brought against state actors. *Jett v. Dallas Independent School District,* 491 U.S. 701, 735 (1989); *Zombro v. Baltimore City Police Dept.,* 868 F.2d 1364, 1366 (4th

Cir.), *cert. denied,* 493 U.S. 850 (1989). *See also Dennis v. City of Fairfax,* 55 F.3d 151, 156 n.1 (4th Cir. 1995) (clarifying that 1991 amendments to Civil Rights Act, also amending 42 U.S.C. § 1981, did not affect vitality of *Jett*). *But see Federation of African American Contractors v. City of Oakland,* 96 F.3d 1204, 1214 (9th Cir. 1996) (holding that amended Section 1981 contains implied cause of action against state actors). Since Petitioner's Section 1983 claim is barred by the statute of limitations and is, as shown, otherwise legally insufficient, as a matter of law in this Circuit he can have no remedy against Respondents, state actors, pursuant to Section 1981. Moreover, the individual defendants in their individual capacities could not be found liable on any breach of contract claim under state law, for the sole parties to that contract were Petitioner and FSU.

Petitioner has not shown that the District Court and Court of Appeals decisions from which he appeals have decided an important federal question in a way that conflicts with relevant decisions of this Court or with any relevant decision by a state court of last resort. In fact, as Respondents have shown, the decisions appealed from are fully consistent with this Court's precedent pertinent to Petitioner's claims. Therefore, the Petition does not merit this Court's grant of certiorari.

CONCLUSION

For the foregoing reasons, this Court should decline the petition for certiorari.

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April 2, 1998

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No. 97-1271

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

Dr. TENKASI M. VISWANATHAN --- PETITIONER

VS.

THE FAYETTEVILLE STATE UNIVERSITY

BOARD OF TRUSTEES et al. --- RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where the Respondents concede that the only right Petitioner enjoyed was access to a three-level post termination appeal process, granted by the university tenure Policies and Regulations, what is the legal basis for such a right, if not an application of the theory of unilateral contract modification?

2. Where it is conceded that the only right Petitioner enjoyed was access to a three-level post termination appeal process, and where in each one of the three levels, the decision is rendered by a panel of six or more persons, what is the legal basis, after the appeal process has begun, for a decision by the FSU Chancellor acting as a single person? Between the original decision of the FSU Dean and the de novo decision of the FSU Chancellor, which one constitutes the right decision for appellate review by the levels of appellate process? Is this not a matter for the jury to decide?

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

REPLY TO BRIEF IN OPPOSITION

Petitioner Viswanathan respectfully submits this Reply to Respondents' Brief in Opposition addressing two new points raised in the Brief.

I. WHAT IS THE LEGAL BASIS FOR THE RIGHT PETITIONER ENJOYED TO ACCESS APPEAL PROCEEDINGS, EVEN THOUGH HE WAS NOT EMPLOYED BY FSU?

While the Respondents keep asserting that Petitioner's status after the February 8, 1990 notice of non-renewal of his first appointment at FSU is one of legal nullity, they nevertheless concede at page 8 of their Brief in Opposition that "[t]he only right Petitioner enjoyed was access to a three-level post termination appeal process, granted by the FSU Tenure Policies and Regulations for appeals of non-reappointment decisions". They do not explain how in 1993, three years after the termination of his original appointment in 1990 and two years after

Viswanathan had already finished running through all three levels of appellate proceedings by September 16, 1991, Viswanathan could have again gained the right to another set of three-level appellate proceedings? What is the legal basis for such a right giving him access to two sets of three-level appellate proceedings?

The first set of the three-level appellate proceedings resulted in the September 16, 1991 Order of the UNC Board of Governors, where the Board made a modification to the Regulations as explained below. Appendix to Petition at A-19, A-23. The UNC Board found that the February 8, 1990 non-reappointment decision could have been impermissibly based on Viswanathan's critical remarks' "[o]n December 4, 1989 at a faculty meeting with the Chancellor". Since the FSU Tenure Policies and Regulations did not provide a procedure for handling a non-reappointment decision that is found to be impermissibly based, the Board had to make a modification to the regulations through its September 16, 1991 Order(Appendix to Petition at A-23, A-24) as follows:

> An appropriate remedy in cases, where a non-reappointment decision is based on an impermissible reason is to conduct a new review of the faculty member's credentials. * * * To accomplish these ends, the Committee recommends that the non-reappointment decision be reversed and that Professor Viswanathan be given an opportunity to request reappointment as an Associate Professor. This request, if made should follow the procedures prescribed by FSU Tenure Regulations and should be initiated at the department level."

Under the holding of Yartzoff v. Democrat-Herald Publishing Co., 281 OR 651, 576 P.2d 356 (1978), the order of September 16, 1991 of the UNC Board is a modification of the original contract, and the Petitioner's adherence to it by his compliance with the requirements of the application process, and the regulations provided sufficient consideration for any such modification. Also, Weiner v. McGraw-Hill, Inc., 57 N.Y2d 458, 457 N.Y.S.2d 193, 443 N.E.2d 441: "If the employer makes a promise, either express or implicit, * * * the contract is modified once 'the employee has begun or rendered some of the requested [ordered] service or given any other consideration.'" Also Loffa v. Intel Corporation, 153 Ariz. 539, 544-545, 738 P.2d 1146, 1151-1152 (1987):

New provision distributed subsequent to the original employment contract may modify the original status of the employment relationship.

Petitioner draws to the attention of the Court the following: When Viswanathan's new application made in September 1991 did not result in a job offer, Respondents refused to recognize any right of the Petitioner for any level of post-terminal appeal process alleging that those procedures only applied to employees. Appendix to Petition for Writ of Certiorari at A-37, A-38 and the Order on Petition for Judicial Review at A-28- A-30. Now in their Brief in Opposition, they concede that Petitioner had a right to a second round of access to a three-level post termination appeal process. But, they do not explain what the legal basis of this right is and how their theory of Petitioner's status of legal nullity is compatible with this right.

Had Petitioner not followed the prescribed procedures in the FSU Tenure Policies, Respondents would have immediately terminated all proceedings. In the same vein,

FSU is bound by the regulations and in particular by Section 5 of the FSU Tenure Policies. Please see Wagner v. Sperry Univac. Div. Of Sperry Rand Corp., 458 F.Supp. 505 (E.D. Pa. 1978), aff'd. without op., 624 F.2d. 1092 (3rd Cir. 1978).

In Pine River State Bank v. Mettile, 333 N.W.2d 622, (1983), the Minnesota Court applied the theory of unilateral contract modification: Petitioners' continued performance of the regulatory procedures afforded necessary considerations and FSU gained advantage through reputation as a protector of academic freedom, so important to FSU. Please see importance of academic freedom to FSU in retaining faculty members of high quality. Appendix to Petition at A-44, A-45, and A-42. "[T]he jury could have found the existence of a contract between the parties." Petitioner had requested a jury trial as to all issues.

II. WHAT IS THE LEGAL BASIS FOR THE CHANCELLOR'S INTERFERENCE?

The Respondents concede at Page 8 of their Brief in Opposition that Petitioner had a right to a three-level

appellate proceedings. These three levels are as follows: A review by the FSU Hearing and Reconsideration Committee dated July 12, 1993 (Petition for Certiorari at 23 and Appendix to this Reply to Brief in Opposition at A-16), a review by the FSU Board of Trustees dated October 5, 1993 (Appendix to Petition at A-32) and a review by the UNC Board of Governors dated September 9, 1994 (Appendix to Petition at A-35, A-40). Respondents concede that there are only three levels of appellate proceedings. How then can one explain a legal basis for the August 2, 1993 decision of Respondent Hackley, then Chancellor of FSU, given the Respondents' own assertion that the Chancellor is not one of the three levels of appeal proceedings. Brief in Opposition at page 6, and Petition for Certiorari at 24.

Moreover, each one of the three levels of appellate proceedings consisted of a panel of at least six members. The Appendix to this Reply to Brief in Opposition at A-1, A-27 contains the names of all six members of the FSU Hearing and Reconsideration Committee; the FSU Board of Trustees

is composed of 13 persons (N.C.G.S., Section 116-31 at Appendix to this Reply to Brief in Opposition at A-18); the Committee on University Governance that made the Report at A-35 of Appendix to Petition consists of six elected members (The Code: The University of North Carolina, Section 301(d) at A-17 of Appendix to this Reply to Brief in Opposition) and the UNC Board that approved the Report consists of 16 elected members (N.C.G.S., Section 116-6 at A-18 of Appendix to this Reply to Brief in Opposition). Thus, given that the appeal process started in June, 93 (Petition for Certiorari at 23 and Appendix to this Reply Brief at A-1), and that each one of the three levels of appeal proceedings consisted of a panel of at least six members, how does one explain the action by Respondent Hackley, then Chancellor acting as **a single person** and exercising a decision on August 2, 1993? Moreover, the Chancellor is one of the academic officers in the channel for review of faculty's credentials (Appendix to Petition at A-49, A-50), prior to the initiation of appeal proceedings. He is also the

CEO of FSU. Under North Carolina Law, the functions of advocacy and adjudication shall not be performed by the same person in the administrative process. Appendix to this Reply Brief in Opposition at A-19. What is under review is the decision of Respondent Jon Young and the focus of inquiry is if Respondent Young acted impermissibly under one or more of the impermissible grounds stated in Section 5.A. of the FSU Tenure Policies? Under these circumstances, a decision by the Chancellor standing alone is of no consequence until its inclusion in the appellate process on October 5, 1993, when the FSU Board of Trustees decided to accept the Chancellor's decision in the appeal process. Of the two decisions one by Respondent Young and the other by Respondent Hackley, "which one is the correct decision that should go forward in the appeal process" is a question of material fact that should be decided by the jury.

The sole duty of the Chancellor under the UNC Code was to forward the Decision of the Hearing and Reconsideration Committee to the FSU Board of Trustees,

since there is no direct communication between the Hearing Committee and the Board of Trustees. (Appendix to Petition at A-63, A-64.) It could be argued that the regulations are ambiguous about a decision by the Chancellor after the appeal process has begun and that "reasonable minds could differ" about this issue. Under those circumstances, the issue is for the jury to decide. Lewis v. Equitable Life Assurance Society of the U.S., 389 N.W.2d 876 (1986). The employer could not be permitted to be "the sole judge and final arbiter of the propriety" of the decision of a single administrator – that too the C.E.O. of FSU ---, since it would increase arbitrarily the number of appeal proceedings to four. Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 620-624, 292 N.W.2d 895-897.

Like the theory and practice of "corrective discipline" endorsed by the South Dakota Court in Osterkamp v. Alkota Mfg., Inc., 332 N.W.2d 275 (1983), the UNC Board through its September 16, 1991 Order created a theory of remedies for impermissible non-reappointment decisions, and stated as

in Osterkamp a procedure for implementing the remedial theory. That required adherence to the procedures in Section 5.G. of the FSU Tenure Policies, a holding also affirmed by the Superior Court of New Hanover County. Appendix to Petition at A-30, A-31. Under this theory, the sole focus of inquiry is the motivation and behavior of Respondent Young.

CONCLUSION

Based on the decision by the Third Circuit Court of Appeals in Wagner, 624 F.2d. 1092 (3rd Cir. 1978), and other relevant decisions by various State Courts of last resort, cited above and the Petition for Certiorari, the Petition for certiorari should be granted.

Respectfully submitted this the 14th day of April 1998.

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APPENDIX

APPENDIX A

Hearing and Reconsideration Committee
Fayetteville State University
Fayetteville, North Carolina

T.M. Viswanathan, Petitioner Fayetteville State University, and Acting Dean Jon Young, Respondent	DECISION of the Hearing and Reconsideration Committee

The Hearing and Reconsideration Committee (hereafter referred to as the Committee) convened on Wednesday, June 2, 1993 to hear the case of Dr. T.M. Viswanathan, Petitioner, and Fayetteville State University (hereafter FSU), Respondent. The Committee consisted of Dr. Clarence White, Chairman, and Drs. Ophelia Holmes, Elaine Newsome, Barry Griffin, Rolland Johnson, and Claude Hargrove. (Dr. Griffin had to leave the meeting during the recess in the afternoon, did not return and did not participate in the decision meeting on the following day.) Dr.

Viswanathan was accompanied by Dr. Phillip Maguire as Faculty Advocate, while FSU was represented by Dr. Jon Young, Acting Dean of the College of Arts and Sciences.

Minutes prior to the formal opening of the meeting, the Committee convened to consider a request on the part of the Respondent, as represented by Dr. Jon Young, Acting Dean, to exclude Dr. Claude Hargrove, a member of the Committee, from the hearing. In a letter addressed to the chairman of the Committee, Dr. Clarence White, Dr. Young challenged the ability of Dr. Hargrove to render an impartial decision in the present case since the latter is allegedly in current pursuit of a grievance against the Acting Dean, Dr. Young.

The Committee ruled against the request of Dr. Young. It affirmed its confidence in the integrity of Dr. Hargrove to be able to maintain objectivity in the current case and to be able to sort through the particulars of the case at hand on the basis of its own merit.

The hearing was ordered by The General Court of Justice, Superior Court Division, File No. 92 CVS 2024, of New Hanover County, North Carolina. Signed by the presiding Superior Court Judge Quentin Sumner, the Court ordered Fayetteville State University to give the Petitioner, among other things, the " * * * opportunity to request a review of Dr. Jon M. Young's decision by the Hearing and Reconsideration Committee *." In this court's decision, it found that the rights of the Petitioner had been prejudiced because the University had made a final decision based upon unlawful process and procedure " * * under N.C. Gen. Stat, Section 150B-51(b)(3) in that the Petitioner was denied the process and procedure set out in Section 5 of the Fayetteville State University Tenure Policies and Regulations * * *.

A brief history of the case shows that Dr. Viswanathan was originally appointed to a one-year tenure track term at FSU, was not reappointed and followed the appeal procedures as appropriate and specified by the UNC Code and the Tenure Policies and Regulations established at

FSU. Claiming dismissal on impermissible grounds as specified by Section 5 of the FSU Tenure Policies and Regulations, the Petitioner was granted a favorable decision by the Hearing and Reconsideration Committee in its May 8, 1990 meeting, and that body recommended that the decision not to reappoint be reversed. On August 24, 1990, Chancellor Lloyd Hackley did not accept the decision and again ruled for non-reappointment, and the latter's ruling was subsequently upheld by the Board of Trustees at FSU. The Petitioner then appealed to the UNC Board of Governors who, on Sept. 13, 1991, reversing the position of FSU, found that the non-reappointment could have been based on impermissible grounds. Thus the Board of Governors remanded the case back to FSU for another review with the prior taint removed, and allowed for a current review of the Petitioner's credentials with the appeal to be undertaken by the policies established under the FSU Tenure Policies and Regulations.

On May 6, 1992, Chancellor Hackley informed President C.D. Spangler, President of the UNC Board of Governors, of his decision not to reappoint Dr. Viswanathan based upon the recommendations of the Dept. Chair of Mathematics, Dr. Morris Blount; the Acting Dean of the College of Arts and Sciences, Dr. Jon Young; and the Acting Vice Chancellor of Academic Affairs, Dr. Leo Edwards. As part of this same action, the faculty of the Math Dept. Had voted unanimously in favor of reappointment with one abstention. Following this latter decision by Chancellor Hackley not to reappoint, the Board of Governors upheld the Chancellor's decision on June 16, 1992. The Petitioner then appealed for a Judicial Review and the hearing before the Superior Court was held on February 8, 1993. The ruling of the Court has been specified in the third paragraph of this report, and it was the result of that ruling that compelled the present meeting of the Hearing and Reconsideration Committee.

The opening presentation of the meeting was the case by the Petitioner, Dr. Viswanathan, citing the court order for the hearing and contending that Dr. Young's decision not to reappoint him was impermissible on basis of:

1. Violation of his First Amendment rights as guaranteed by the US Constitution and the N. Carolina Constitution;
2. Personal malice on the part of Dr. Young, in violation of section 5.A. of the Tenure Policies and Regulations of FSU;
3. Discrimination by Dr. Young against Dr. Viswanathan because of his national origin which is Asian [of India].

He further contended that the second review of his case which the Board of Governors had remanded back to FSU had not followed that Board's mandate that:

1. The prior taint should be removed, a fresh new look was to be taken at the Petitioner's credentials; and
2. The procedure should follow the procedures prescribed by the FSU Tenure Policies and Regulations and initiated at department level.

Accompanying the case of the Petitioner was an extensive set of documentary evidence including 377 exhibits and 34 pages of preliminary exhibits, as well as an additional treatise, well in excess of 110 pages which provided a narrative of his effort to become reappointed at FSU as well as his interpretation of the many administrative decisions and hearings for and against his case. The exhibits highlighted the correspondence between himself and all administrative components of the university system involved in his case, comprehensive evaluations by the department chair and students, as well as vitae and more.

The case against reappointment was presented by the Acting Dean of the College of Arts and Sciences, Jon Young. Speaking for and acting on behalf of the university, Dr. Young based his reasoning for the negative decision against the Petitioner, Dr. Viswanathan, upon the following items:

1. The recommendation of the Department Chair, Dr. Morris Blount;

2. The unsuitedness of Dr. Viswanathan to coordinate a Math Education program of lower level math;
3. The student evaluations of the Petitioner's courses based upon the spring 1990 data being below the university average;
4. The excellent research and publications record of Dr. Viswanathan being an indication of potentially ineffective performance in lower level courses;
5. Dr. Viswanathan's area of expertise, algebra, not being a current area of the university's needs; and
6. The irrelevance of Dr. Viswanathan's recent professional activities, which include both a year of secondary school teaching and a North Carolina certification in math in which the Petitioner scored at the 99 percentile level.

The Hearing and Reconsideration Committee found unanimous disagreement with each of the items listed above which were presented by the Respondent, Dr. Young, as reasons for not reappointing the Petitioner, Dr. Viswanathan. The essence of the deliberations of the Committee and the

conclusions of that body taken in the seriatim order as listed on the previous page, went as follows:

1. The department chair recommendation. The decision not to reappoint Dr. Viswanathan did NOT begin on the department level as the Board of Governors mandate of September 13, 1991 required. Exhibit E-121, presented by the Petitioner, is a copy of the FSU faculty personnel action form which was mistakenly sent to him by Dr. Young. In favor of reappointing Dr. Viswanathan, the document clearly shows the unanimous consent of the tenured faculty of the department with one abstention, the signature of Dr. Blount, the department chair, in agreement with the faculty decision, and his signature dated March 17, 1992. On the next line, there appears the signature of Dr. Young disagreeing with the decision, but dated April 30, 1992. When another version of this same form was sent to Dr. Viswanathan the following day, it indicated the disagreement of Dr. Blount for the Petitioner's reappointment, but yet it was initialed and

dated back to March 17, 1992, as if Dr. Blount had agreed and changed his mind on the same day. It was unmistakably obvious to the Committee that contrary to the testimony of Dr. Young, the decision to not reappoint Dr. Viswanathan DID come from above, and the department chair knew of the negative action taken by his administrative superior, Acting Dean Jon Young, at least thirteen days before he made his negative decision. The Committee construed this act of intentional deception commencing at least at the level of the Acting Dean with subsequent complicity of the department chair to conform to that decision, to be a definite act of bad faith inflicted by the administration upon the Petitioner.

2. The unsuitedness of Dr. Viswanathan to coordinate a Math Education program. This item presented [by] Dr. Young is totally new and is unsupported by any documentation that it was ever a factor in any administrative decision concerning Dr. Viswanathan until the day of the hearing before the Committee. Because of

its novelty and total absence of documentation, the Committee unanimously rejected it as unworthy of serious consideration.

3. The student evaluations. The Petitioner presented four exhibits detailing the evaluation of the students in his classes for Spring 1990. Based upon a maximum of five, the scores were:

Average Score	University Average	Course	# of Students
3.77	4.21	College Algebra	18
3.78	4.21	Finite Math	9
4.26	4.21	College Algebra	20
4.27	4.21	Modern Algebra	3

It was the stated position of Respondent, Dr. Young, that these scores --- two of them being below the university average --- are worthy of non-reappointment. The Committee strongly disagreed with that assessment by Dr. Young. All members have been judged by the same evaluation instrument for many years, and are fully aware that these scores are exemplary. Moreover, Dr. Young's position with regard to the eminence of the university

average as an evaluative tool was both challenged by the Committee, and based upon the breadth of categories it includes, was held in little regard by that body. Averages usually include a distribution above and below some median value which, depending upon its symmetry, can possibly include fully half the faculty below and above the median level. According to the reasoning of Dr. Young, who would not reappoint faculty members whose rating fell below the university average, fully half the faculty should be discharged.

4. The research and publication record of Dr. Viswanathan. As was brought out in testimony by a sworn witness, the research and publication record of Dr. Viswanathan was far superior to that of any of the math faculty current at that time of the hearing. Moreover, the need of the university for a person of such a background was likewise a part of sworn testimony. The Committee did not favorably view the reasoning of the Respondent, Dr. Young, that the demonstrated excellence in research by

the Petitioner automatically excluded him from excellence in the classroom. Moreover, the Committee felt that the student evaluations amply demonstrated just such mastery.

5. The lack of need of the university for an algebraist. Here again, the Committee accepted the sworn testimony of an informed member of the math department and held little regard for the reasoning of the Respondent.
6. The recent activities of the Petitioner. Though diminished in importance by FSU as evinced in the testimony of Dr. Young, the passing of the NTE at a 99 percentile level in ANY pool of other exam-takers, the resulting North Carolina certification in math teaching, and his recent work teaching on the secondary level were held in high regard by the Committee.

In summary, based upon the evidentiary excellence shown by the case as presented by the Petitioner, Dr. T.M. Viswanathan, the Hearing and Reconsideration Committee finds no reason for which he should have been denied a

second one-year contract at FSU. The case as presented by the Respondent, Fayetteville State University/Dr. Jon Young, did not provide evidence of good faith nor substance in choosing not to reappoint him. In failing to recognize any merit in the negative choices made by FSU with regard to the Petitioner, Dr. Viswanathan, the Committee cannot avoid the conclusion that Fayetteville State University, as represented by the decisions against Dr. Viswanathan, DID act with PERSONAL MALICE against the Petitioner. The Committee also finds that the mandate as directed by the board of Governors directive of September 13, 1991, requiring that Dr. Viswanathan's request for reappointment follow the guidelines of FSU's Tenure Policies and Regulations, and that the actions be initiated at the department level was NOT followed. In fact, the evidence clearly shows that the initial decision to not reappoint began, at least, in the office of the Dean of the College of Arts and Sciences, Dr. Jon Young.

The Committee further finds that the considerations undertaken by Dr. Jon Young did not remove the prior taint as ordered by the Board of Governors, and that there is a strong likelihood that some of the judgments made in the Dean's office may have been an outgrowth of past statements of Dr. Viswanathan which, even when used surreptitiously, are a violation of the Petitioner's first amendment rights.

In addition, the Committee agrees that the requirement by Dr. Young that made Dr. Viswanathan submit proof of his visa status before making an offer of employment was inappropriate and had a chilling effect on the processing of Dr. Viswanathan's application. It was in the Committee's opinion, a delaying strategy used by Dr. Young to frustrate Dr. Viswanathan's efforts to have a timely disposition of his employment application. The Committee thereby construed that to the extent that this improper requirement was a tool which could only have been used against a person who was not of American descent, it is a de facto mode of

discrimination against Dr. Viswanathan because of his national origin.

Finally, it is the unanimous opinion and recommendation of the Hearing and Reconsideration Committee, as a result of its deliberations on June 3, 1993, having carefully considered the details presented on both sides of this complex case, that the Petitioner, Dr. T.M. Viswanathan, should be granted the second one-year contract on the tenure track at Fayetteville State University. Moreover, the Committee further feels that this unjustified sequence of actions taken by the university over the four years that it has taken thus far to resolve this matter, that the university is morally bound to offer Dr. Viswanathan financial compensation for the pain and suffering which he and his family has had to endure, as well as his loss of salary during this period.

The deliberations, findings and recommendations of the Hearing and Reconsideration Committee are hereby respectfully submitted on this day of July 12, 1993.

(Sd.) _____
Dr. Clarence White, Jr.
Chairman, Hearing and
Reconsideration Committee

(Sd.) _____
Dr. Claude Hargrove, member

(Sd.)_____
Dr. Roland E. Johnson,
member

(Sd.) _____
Dr. Elaine M. Newsome,
member

(Sd.) _____
Dr. Ophelia M. Holmes,
member

APPENDIX B

THE CODE
BOARD OF GOVERNORS
THE UNIVERSITY OF NORTH CAROLINA

SECTION 301.

THE STANDING COMMITTEES: MEMBERSHIP AND JURISDICTION

301 E. The Committee on University Governance shall consist of six elected members.

APPENDIX C

NORTH CAROLINA GENERAL STATUTE 116-6

ELECTION AND TERMS OF MEMBERS OF BOARD OF GOVERNORS

(a) As the terms of members of the Board of Governors provided for in G.S. 116-5 expire, their successors shall be elected by the Senate and House of Representatives. Sixteen members shall be elected at the regular legislative session in 1993 and every two years thereafter. * * *

APPENDIX C

NORTH CAROLINA GENERAL STATUTE 116-31

MEMBERSHIP OF THE BOARDS OF TRUSTEES

(d) Effective July 1, 1973, each of the 16 constituent institutions shall have board of trustees composed of 13 persons chosen as follows:

(1) Eight elected by the Board of Governors,

(2) Four appointed by the Governor, and

(3) The president of the student government ex officio.

NORTH CAROLINA GENERAL STTAUTE 150B-1

POLICY AND SCOPE OF N.C. ADMINISTRATIVE PROCEDURE ACT

(a) **Purpose.**

This Chapter establishes a uniform system of administrative rule making and adjudicatory procedures for agencies. The procedures ensure that the function of rule making, investigation, advocacy and adjudication are not all performed by the same person in the administrative process

(b) **Rights.**

This Chapter confers procedural rights.